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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 563

HONORABLE STEPHEN S. CHANDLER, UNITED STATES DISTRICT JUDGE FOR THE WESTERN DISTRICT OF OKLAHOMA, *Petitioner*,

v.

OCCIDENTAL PETROLEUM CORPORATION, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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v.

OCCIDENTAL PETROLEUM CORPORATION, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit, entered in the above-entitled case on April 20, 1962.

CITATIONS TO OPINIONS BELOW

The opinion of the Court of Appeals is reported at 303 F. 2d 55. The order of Judge Chandler, reviewed by the Court of Appeals, is printed in Appendix B at p. 21a.

JURISDICTION

The Court of Appeals judgment was entered April 20, 1962, and a rehearing denied on June 1, 1962. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1).

QUESTIONS PRESENTED

1. When reviewing a petition for mandamus to compel a federal district judge to disqualify himself, following the latter's rejection of an affidavit of bias filed pursuant to 28 U.S.C. § 144, does a U.S. Court of Appeals have jurisdiction to receive evidence and make fact findings independently of the record below?

2. May a U. S. Court of Appeals obtain jurisdiction to act on a petition for a mandamus compelling a Federal district judge's disqualification, by issuing a show-cause order at a time when the District Judge in question has not yet ruled on an affidavit of bias filed pursuant to 28 U.S.C. § 144?

3. When reviewing a petition for mandamus to compel a federal district judge to disqualify himself, following the latter's rejection of an affidavit of bias filed pursuant to 28 U.S.C. § 144, is the sole question before the Court of Appeals a question of law, namely, the legal sufficiency of the affidavit?

4. What is the proper standard by which to determine whether allegations of fact in a affidavit filed pursuant to 28 U.S.C. § 144 are legally sufficient to compel a District Judge to recuse himself? More particularly, may facts not of extrajudicial origin suffice to require his disqualification for personal bias within the sense of 28 U.S.C. § 144?

5. May a U. S. Court of Appeals employ its Circuit Judicial Council as a fact-finding or advisory body in connection with the court's review of a Federal district judge's rejection of an affidavit of bias filed pursuant to 28 U.S.C. § 144? Further, if it may do so, is it proper for the Court not to allude to this usage in its opinion deciding the matter in question?

6. May a U. S. Court of Appeals issue a mandamus ordering a Federal district judge to disqualify himself from an entire case, following the latter's rejection of an affidavit of bias filed under 28 U.S.C. § 144, when the only remedy prayed for in the affidavit was that the judge assign two pending motions to another judge for hearing and adjudication?

7. Was the mandamus ordering petitioner's disqualification in the circumstances of the present case a sound exercise of discretion by the Court of Appeals for the 10th Circuit?

STATUTES INVOLVED

The statutory provisions involved are 28 U.S.C. § 144; 28 U.S.C. § 332; 28 U.S.C. § 1651; 28 U.S.C. §§ 1291 and 1292.

STATEMENT OF THE CASE

During the course of a reorganization in bankruptcy proceeding in the United States District Court for the Western District of Oklahoma, in which Judge Stephen Chandler was sitting, Occidental Petroleum Corporation, one of the creditors, filed an affidavit of personal bias pursuant to 28 U.S.C. § 144, along with an application for Judge Chandler's disqualification (App. A, p. 1a *et seq.*). It did so on March 2, 1962.

The affidavit stated affiant's belief that Judge Chandler was personally biased against Occidental. In support of this assertion, it recounted some of the history of the rather protracted litigation and enumerated several remarks made by the Judge therein. In its affidavit Occidental prayed that Judge Chandler disqualify himself from hearing two motions then set down for hearing on March 13, 1962. One motion, by the trustee in bankruptcy, was to subordinate Occidental's stock in the debtor corporation. The other was to tax certain costs against Occidental for having failed to fulfill its responsibilities under an earlier reorganization agreement.

On March 6, 1962, Occidental filed an original petition in the Court of Appeals for the 10th Circuit, seeking a writ of mandamus and/or prohibition, restraining Judge Chandler from conducting the hearing scheduled for March 13 or from deciding any other matters arising from the bankruptcy proceedings which "may affect Petitioner in any manner other than merely as a member of the class of preferred stockholders of Parker. . . ." (R. p. 2-i). In the petition—to which a copy of the March 2 affidavit was appended—Occidental recited the pendency of the trustee's motions, its belief as to Judge Chandler's personal bias and several other items. Upon receiving the petition, the Court of Appeals immediately filed an order, staying the district court proceedings and requiring Judge Chandler to show cause at a March 12 hearing why the writ should not issue (R. p. 3).

On March 9, 1962, Judge Chandler issued an order in which he adjudged the affidavit of bias to be "legally insufficient." (App. B, p. 22a) He also noted, nonetheless, his willingness to assign to another judge any

questions involving Occidental, saying "The Court further states that prior to the filing of the motion to disqualify . . . counsel for applicants were advised . . . by the attorney for the Trustee . . . that if they preferred that such matters be tried by another judge . . . that such matters would be assigned to another judge. . . . "

Later, at the March 12 hearing before the Court of Appeals, Occidental presented to that court a petition for leave to amend and supplement its petition of March 6, "and to . . . enlarge the prayer for relief set forth therein. . . . " (R. p. 5) In this petition, which was received by the Court of Appeals (R. 6), Occidental prayed that Judge Chandler be restrained from hearing or deciding "all matters arising in these proceedings . . . whatsoever. . . . " (R. p. 5q) Occidental had not made such a request of the district court, nor had it served a copy of the petition on Judge Chandler before filing it with the Court of Appeals.

The Court of Appeals for the 10th Circuit, through a three-judge panel, presided over hearings on the disqualification question on March 12 and 13 and April 10, 1962. At these hearings the Court received evidence, in the form of testimony and exhibits, and heard arguments by all interested parties (See generally R. 7-a and 12, where the reporter's transcript of the March and April proceedings are incorporated by reference). In an order of March 14, restraining Judge Chandler from proceeding further in the bankruptcy proceeding, the Court stated, *inter alia*, that the disqualification matter was being heard "on the petition and amended petition of Occidental Petroleum Corporation. . . . " (R. p. 9)

At the close of the April 10 session the Court of Appeals resolved to refer the disqualification question

to the 10th Circuit Judicial Council, deeming it to be a matter of unusual seriousness (App. C, p. 27a).

On April 20, 1962, the Judicial Council convened at 11 a.m. in Denver, Colorado, considered "all matters presented to the Court" in connection with the mandamus proceeding and issued an "order" the same day (App. C). The "order" made express findings that Judge Chandler had conducted hearings in chambers without inviting all interested litigants, had tried to prevent a court officer from performing his official duties, possessed a personal bias against Occidental and concluded that the "proper administration of justice requires that all further proceedings in connection with the Parker bankruptcy be heard . . . by another Judge."

Later, on the same day, the Court of Appeals filed a *per curiam* opinion ordering Judge Chandler's total disqualification from the bankruptcy proceeding. In its opinion the Court made express findings of fact "[F]rom the record made before us . . . ." These findings duplicated *verbatim* those listed in the Judicial Council "Order," but did not refer to it. (App. C, pp. 25a and 28a).

REASONS FOR GRANTING THE WRIT

1. In receiving evidence and making factual determinations independently of the record below, the Court of Appeals for the 10th Circuit departed so egregiously from what is felt to be the statutory limit of jurisdiction for federal appellate tribunals, as to invite review on the strength of the Court's supervisory duties toward inferior federal courts.

2. There is a serious question as to whether the Court of Appeals had jurisdiction to issue the mandamus since the show-cause order, by which it undertook to

assert jurisdiction, was issued before Judge Chandler had ruled on the affidavit of bias and application for disqualification filed in the district court.

3. The 10th Circuit's use of its Judicial Council as fact finder and advisor or a quasi-judicial arm was an unprecedented and extra-legal course of action. The statute creating such councils, 28 U.S.C. § 332, contemplates only an administrative or business function for the counsels. Furthermore, the error of this novel tactic is compounded by the fact that the court of appeals failed to mention in its opinion its reliance upon the Judicial Council, although the purported findings of fact in the opinion reflected *verbatim* those in the Judicial Council "order."

4. There is a pronounced conflict between the 10th, 1st and 6th Circuits as to whether a Court of Appeals, when reviewing a district judge's refusal to disqualify under a 28 U.S.C. § 144 affidavit, is confronted solely with a question of law or may review facts as well. In *Green* v. *Murphy*, 259 F.2d 591, 593 (1st Cir. 1958), a case procedurally identical to the present one, the Court in dismissing the petition, stated that "[t]here can be no dispute either in the district court or on appeal as to the truth or falsity of the allegations of the affidavit. It held that "the legal sufficiency of what is alleged in the affidavit . . . and the inferences . . . which may be drawn properly therefrom constitute the very basis on which the issue of disqualification . . . must be decided ultimately."

In *Albert* v. *United States Dist. Court for the Western Dist. of Michigan*, 283 F. 2d 61, 62 (6th Cir., 1960), the court observed flatly "[m]andamus does not lie to compel a judge of an inferior court to reverse a decision made by him in the exercise of a legitimate jurisdiction . . . or to compel him to decide

according to the dictates of any judgment but his own . . . ."

There is a similar conflict in practice between the 10th and other circuits. See, *e.g.*, *Williams* v. *Kent*, 216 F.2d 342 (6th Cir. 1954); *Tucker* v. *Kerner*, 186 F.2d 79 (7th Cir. 1950); *Hurd* v. *Letts*, 152 F.2d 121 (D.C. Cir. 1945); *In re Lisman*, 89 F.2d 898 (2d Cir. 1937).[1]

5. There is a further conflict between the 10th and 7th Circuits as to the *propriety*[2] of issuing a mandamus compelling a district judge's disqualification following the latter's rejection of an affidavit of bias--quite apart from the question as to the appellate court's scope of inquiry. See *Korer* v. *Hoffman*, 212 F.2d 211 (7th Cir. 1954).

6. Despite the advanced age of 28 U.S.C. § 144, and the fairly recurrent litigation it has spawned, its substantive content is still marked by several uncertainties. Because this provision treats of perhaps the most delicate step in the entire federal judicial process —from the standpoint of inspiring confidence in ltigants—the instant petition raises legal questions of inherent significance.

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[1] *Cf. also Skirvin* v. *Mesta*, 141 F. 2d 668 (10th Cir. 1944).

[2] On the matter of whether an appellate court has the naked *power* or jurisdiction to issue the writ in such cases as the present one, petitioner's analysis of *LaBuy* v. *Howes Leather Co.*, 352 U.S. 249 (1957), leaves him uncertain as to its applicability. If *LaBuy* does not control the present case, petitioner wishes to urge, in addition to the questions raised in the text, the serious question as to whether the 10th Circuit had jurisdiction under the all-writs act to require Judge Chandler's disqualification by mandamus. Furthermore, if this Court should consider the time right for reconsideration of the rather broad construction that has been put on the all-writs act, the instant case affords a suitable vehicle for such reconsideration.

ARGUMENT

The proceedings of the 10th Circuit below abound with error, some so glaring as to invite consideration by this Court. To grant the writ of certiorari in this case would be altogether consistent with this Court's traditional practice of reserving it for review of important questions of law.

Logically, the first problem raised by the 10th Circuit's issuance of the mandamus is the very grave question as to whether it had the requisite jurisdiction to do so. As the record clearly discloses, Occidental filed its original petition for mandamus on March 6, 1962. The Court of Appeals, by issuing a show-cause order on the same day, asserted jurisdiction over the petition—at least putatively. Judge Chandler's ruling on Occidental's affidavit, however, did not follow until March 9. Since Occidental's affidavit and application for disqualification were *sub judice* when the petition in the appellate court was filed—and since it was essentially Judge Chandler's decision on these matters that petitioners wanted the 10th Circuit to review—it would seem that the assertion of jurisdiction was premature. The fact that the Judge ruled on the affidavit, finding it legally insufficient, was in time considered by the Court of Appeals. If, however, on the date of the show-cause order that court lacked jurisdiction to consider the petition for mandamus, it follows that it did not acquire such jurisdiction merely because it *later* considered the judge's decision. It is important to note also that, once proceedings had been initiated in the Court of Appeals, there was no subsequent motion or pleading by petitioner that could be said to cure the original defect of no jurisdiction.

Even assuming that the Court had jurisdiction to hear and decide the petition for mandamus, there is

the second, and still more troublesome question of whether it had jurisdiction to receive evidence and compile its own record as a basis for deciding the matter—in effect, to conduct a trial *de novo.*

Under the all-writs statute federal courts of appeal are restricted in issuance of extraordinary writs of mandamus to those instances in which such writs operate "in aid of their jurisdiction." This jurisdiction is exclusively statutory in origin, and appellate in character. *Kentucky* v. *Powers*, 201 U.S. 1, 24 (1905); *Whitney* v. *Dick*, 202 U.S. 132, 137 (1905); *Ex parte Bollman,* 4 Cranch 75, 93 (1807, Marshall, C.J.). The jurisdictional grants are found in 28 U.S.C. §§ 1291 and 1292. By definition and by unbroken tradition this appellate jurisdiction does not include the authority to take testimony or other evidence and to make factual evaluations entirely apart from the record in the court of original jurisdiction.

What the 10th Circuit actually did in the present case was to conduct a trial *de novo* on the issue of the trial judge's disqualification. Any reluctance to accept this characterization of the proceedings below is readily dissipated by even a casual examination of the record. The record discloses that the Court of Appeals issued orders that the matter be tried to the court. (R. p. 6). The proceedings before the court (sitting as a Court rather than as Judicial Council) consumed some 400 pages in the reporter's transcripts. (R. 7-a and 12). The record is replete with offers of evidence and formal receipt thereof, cross-examination, exhibits, objections to evidence and rulings by the court, and the like.

This *de novo* trial—if nothing else perpetrated by the Court— was unmistakable error of the most graphic character.

It could be argued to this Court that the instant decision of the Court of Appeals for the 10th Circuit is a temporary deviation from the practice evidently well established elsewhere. Such a conceivability, however, is less than realistic. The "deviation" represented in the present decision is already institutionalized in the 10th Circuit. See *United States* v. *Ritter*, 273 F.2d 30 (10th Cir. 1959). There is, moreover, no hope of change in sight.

The instant decision is also logically incompatible with the thesis of *Berger* v. *U.S.*, 225 U.S. 22 (1920). There, this Court clearly held that a district judge, when faced with an affidavit of bias filed under 28 U.S.C. § 144, may rule on its legal sufficiency but may not dispute the facts alleged in it. If the only question before the trial judge is one of law rather than fact, this obviously suggests that the same would be true on an appeal from the judge's decision. Accordingly, in reviewing a trial judge's rejection of such affidavits, appellate courts have considered themselves confined to reviewing the question of the affidavit's legal sufficiency. See generally the cases cited *supra* at pages 7 and 8 and especially *Green* v. *Murphy*.

The mandamus writ is, of course, a discretionary one. *Ex parte Peru*, 318 U.S. 578 (1943). The most venerable proposition in Federal law, relative to use of the mandamus to control actions of lower courts, is that the writ should lie only in exceptional cases, typically where the lower court has acted without jurisdiction or has clearly usurped judicial power. *Bankers Life Co.* v. *Holland*, 346 U.S. 379 (1953); *In re Parsons*, 150 U.S. 150 (1893); *Ex parte Hoyt*, 13 Pet. 279 (1839, Story, J.).

It is striking, therefore, that the Court of Appeals for the 10th Circuit is the only one to have issued two mandamuses compelling a district judge's disqualification, following the latter's rejection of an affidavit of bias. Furthermore, it appears to be the *only* court ever to have done so where the facts alleged in the affidavit of bias occurred *during* the very judicial proceeding from which a litigant sought to remove the trial judge.

It is all the more striking because the very factors which have influenced other federal appellate courts to deny the writ in cases like the present one are also present here. Probably the most significant of these reasons are: (1) the fact that an alternative remedy by appeal is available to petitioner and (2) the fact that the allegations in the affidavit below related no extrajudicial occurrences whatever, but merely occurrences during the judicial proceeding in question.

It is well established, of course, that Judge Chandler's rejection of the affidavit of bias could be assigned as error on appeal. See *Ex parte American Steel Barrel Co.*, 230 U.S. 35, 45 (1913); *Korer* v. *Hoffman*, 212 F. 2d 211 (7th Cir. 1954); *Minnesota & Ontario Paper Co.* v. *Molynaux*, 70 F. 2d 545, 546 (8th Cir. 1934). The fact that an alternative remedy by appeal is available presents a strong reason for refusing such a writ as was requested below. *Albert* v. *U. S. Dist. Court for Western Dist. of Mich.*, 283 F. 2d 61 (6th Cir. 1960).

Another point overlooked by the Court of Appeals, in its haste to grant the petition for mandamus, was that a district judge, sitting in a reorganization proceeding, occupies both a judicial and, so to speak, an administrative capacity. Allegations of *ex parte* conferences, viewed as a part of a judge's administrative

efforts to run a bankrupt corporation under reorganization, do not logically suggest personal bias, as they might if made in the course of a more typical judicial proceeding. This point was well made before the Court of Appeals below by the Securities & Exchange Commission, which filed an amicus brief in behalf of Judge Chandler.

The case for granting the writ sought below is weakened further by the fact that the affidavit's allegations nowhere speak of facts or transactions arising before the instant judicial proceeding, which might reasonably suggest a pre-existing and personal bias on the part of Judge Chandler. At least one court of appeals appears to regard extrajudicial allegations as a *sine qua non* for disqualification in cases such as the present one. See *Craven* v. *U. S.*, 27 F. 2d 605 (1st Cir. 1927). At all events, the absence of any such extrajudicial allegations in the Occidental affidavit certainly reinforces Judge Chandler's conclusion that it was not legally sufficient to require his disqualification. This point was, of course, not touched upon by the 10th Circuit's opinion, nor did the latter address itself to the general and important question of what standards should properly determine the legal sufficiency or insufficiency of such affidavits. These *lacunae* in that court's opinion, along with the more profound issues of jurisdiction and trial *de novo*, offer compelling reasons for granting certiorari on the instant petition.

In sum, the procedure of the Court of Appeals below, both in creating its own record and in use of the Judicial Council as a fact finding and quasi-judicial advisory arm, was a cardinal aberration from lawful judicial administration. The very fact that the court's decision was inextricably linked with its own

fact findings was enough to vitiate it. The reason is simple. The opinion did not even purport to pass upon the sole question before it, *i.e.*, the legal sufficiency of the original affidavit, with its allegations assumed to be true. The court's enumeration of its fact findings, coupled with its order of disqualification based thereon, constitutes an exercise of jurisdiction the court does not possess. Beyond this, there is a grave question of propriety as to issuance of the writ at all, particularly since the attitude prevailing in the 10th Circuit clashes sharply with the more temperate approach of the other circuits.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

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APPENDIX A

Application for Disqualification and Affidavit of Bias in the District Court

Application for Disqualification of Hon. Stephen S. Chandler

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF OKLAHOMA

Civil Action No. 10807

Application for Disqualification

of

HON. STEPHEN S. CHANDLER

In the Matter of

PARKER PETROLEUM CO., INC., a corporation, *Debtor.*

NOW COMES the Applicant, Occidental Petroleum Corporation, by its attorneys, Howard W. Rea and Bert Barefoot, Jr., and, in accordance with the provisions of 28 U.S.C., section 144, applies for the disqualification of the Honorable Stephen S. Chandler, on the ground that he is personally biased and prejudiced against the Applicant, from deciding any motions in this cause now set for hearing on March 13, 1962, from deciding any other claims, of any nature whatsoever, asserted against the Applicant, other than as a member of the class of preferred stockholders of Parker Petroleum Co., Inc., in connection with the proceedings in the reorganization of said Parker Petroleum Co., Inc., under Chapter X of the Natural Bankruptcy Act, and from issuing any order in judgment in these proceedings in any way affecting the Applicant other than as a member of the class of preferred stockholders of said Parker Petroleum Co., Inc.

In support of this Application, the Applicant states that it has timely filed in this Court an Affidavit of Prejudice

of Hon. Stephen S. Chandler, executed on behalf of Applicant by Armand Hammer, its President, and certified in accordance with 28 U.S.C., section 144, and that said Affidavit set forth facts showing personal bias and prejudice against Applicant on the part of said Judge.

WHEREFORE, it is prayed that this Application be granted.

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BERT BAREFOOT, JR.
Bert Barefoot, Jr.
Barefoot, Moler & Bohanon
1405 Liberty Bank Building
Oklahoma City 2, Oklahoma

CERTIFICATION

The undersigned, counsel of record for Occidental Petroleum Corporation, hereby certify that the foregoing Application for Disqualification of Hon. Stephen S. Chandler is made in good faith.

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Oklahoma City 2, Oklahoma

Affidavit of Disqualification of Hon. Stephen S. Chandler

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF OKLAHOMA

Civil Action No. 10,807

Affidavit of Disqualification

of

Hon. Stephen S. Chandler

In the Matter of

Parker Petroleum Co., Inc., a corporation, *Debtor.*

State of Colorado)
City and County of Denver) ss:

Armand Hammer, being duly sworn, deposes and says:

1. He is the President and principal executive officer as well as a director of Occidental Petroleum Corporation of Los Angeles (hereinafter called "Occidental") a party to the above-entitled proceedings, and makes this affidavit as the principal officer of Occidental and on its behalf.

2. These proceedings and in particular two motions to be heard herein praying for certain action or relief against Occidental are now pending before the Hon. Stephen S. Chandler.

3. Affiant believes and avers that the Judge before whom the said motions in these proceedings are now pending, the Hon. Stephen S. Chandler, has a personal bias and prejudice against affiant and against Occidental and its management.

4. The facts and reasons for the belief that said personal bias and prejudice exists are numerous prejudiced or biased statements and remarks made by the said Judge at hearings in the proceedings, which statements and remarks, more fully set forth below, collectively and cumulatively express hostile and preconceived opinions of affiant's

actions and character, prejudgment of and fixed opinions concerning the facts and law here involved, or personal rancor and bias on the part of the Judge, directed toward affiant and Occidental, and which appear and which affiant believes to be motivated by resentment, irritation or frustration at the difficulties encountered by the Judge in attempting to press through a plan of reorganization for the debtor, at being reversed by a Court of Appeals upon conclusions to which the said Judge obviously still adheres, or at inability to obtain substantial financial participation or support from Occidental for the proposed Western plan, which Occidental is under no obligation to provide, on the terms desired by the said Judge. The personal bias and prejudice evidenced by said statements and remarks are more apparent if viewed in the context of the circumstances and under the background against which they took place, which may be summarized as follows:

(a) The principal statements upon which this affidavit is based took place in Chambers in the United States Courthouse at Oklahoma City, Oklahoma, at hearings had in these proceedings on the 23rd and 24th days of January, 1962, where the Hon. Stephen S. Chandler, in the presence of the parties, attorneys and individuals indicated in the Reporter's Transcript of Proceedings for such dates, made various and numerous statements concerning affiant and the company of which he is President and chief executive officer, which statements the affiant believes reveal and demonstrate an extreme degree of personal bias and prejudice against affiant and Occidental. The source of affiant's information is the official Transcript of the proceedings had on the 23rd and 24th days of January, 1962, a copy of which was delivered to affiant on March 1, 1962, having been received in New York by affiant's New York counsel, Messrs. Breed, Abbott & Morgan, by mail on the 28th day of February. Breed, Abbott & Morgan received the

transcript from Mr. Fellers, affiant's Oklahoma City counsel, it having been released that day and received by him about 5:30 P.M. on Monday the 26th day of February. The substance of the said statements and remarks of the Court is set forth below.

(b) The occasions of the statements were hearings concerning a confirmed plan of reorganization of the debtor which was proposed by Western Oil Fields (hereinafter called "Western"), following the failure of a previous plan of reorganization by reason of the fact that Occidental, the proponent of the previous plan, had reserved and lawfully exercised its right to withdraw from the said plan on notice. The hearings were concerned with difficulties then being encountered by Western in effecting or placing itself in a position to be able to proceed with its plan, with particular reference to the possible terms, conditions and amount of bank loans or borrowed funds required by the reorganized debtor for the success of the Western plan, and the possibility of obtaining such funds.

(c) The statements were made under circumstances and at a time when there were two motions against Occidental pending before the Court. One is a motion of the Trustee, asking that Occidental's preferred stock in the debtor be subordinated to the interests of other preferred and common stockholders. The other is a motion by a creditor asking that certain so-called costs or expenses of the reorganization be "taxed' as "costs" against Occidental, rather than paid by the debtor's estate, in an amount not less than $250,000.

(d) The Trustee's motion involves the circumstances of Occidental's withdrawal from the prior plan. At the time Occidental elected to exercise its reserved option to withdraw (which the Court of

Appeals determined* it had a *right* to and lawfully did exercise), Occidental cited two grounds for taking such action. As one of the two grounds, Occidental declared that an adverse change had occurred in the condition of Parker, financial or otherwise, which substantially affected the value of the property or business of Parker. The cited change was recently discovered knowledge or information that there had been a recent DeGolyer & McNaughton survey or report which estimated the debtor's reserves at a figure drastically lower than previous estimates, with the anticipated result that the level of Transwestern's "take or pay" guarantee of gas purchases from the Ben Hill well (Parker's principal asset), in connection with a proposed agreement than being negotiated, would be correspondingly reduced. Accordingly Occidental declared that the Trustee could not certify to the absence of adverse changes at closing, as he was required to do under the provisions of the Plan. The gravamen of the Trustee's motion is that this assertion by Occidental was "wholly false and untrue", and thereby irreparably harmed the debtor, delaying reorganization, impairing the interests of other stockholders, etc., and was so "unfair and unjust" that Occidental's interest should not receive equal treatment with other similar or even junior stock interests.

(c) The gravamen of the creditor's motion to "tax costs" is that Occidental, by its action in electing to withdraw from the Plan (and notwithstanding the fact that the Court of Appeals for the Tenth Circuit has determined that under the terms of the Plan Occidental had a valid and lawful right to withdraw which it effectively exercised), "refused to consummate the Plan for reasons best known to itself and wholly

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* *Occidental Petroleum Corporation* v. *Walker, et al.*, 289 F. 2d 1 (10th Cir., Feb. 7, 1961).

without fault" on the part of the debtor and others. The motion assumes (though it does not allege) that this was wrongful, and accordingly urges that Occidental is liable for all expenses incurred in connection with the prior Plan, including all attorneys' fees and costs, estimated at "not less than $250,000.00".

(f) In addition the Judge has repeatedly referred to and emphasized the imminent likelihood of a suit by the Trustee against Occidental for damages on account of its withdrawal from the prior plan, based upon the wording of the clause whereby the plan provided that if Occidental exercised its right of withdrawal, it would reimburse the Trustee for certain expenses incurred in connection with the Plan in an amount not exceeding $25,000, and would not otherwise be liable. It is claimed that under technical provisions or peculiarities of Oklahoma law this agreement for reimbursement, notwithstanding its contractual nature, unwittingly (Judge Wallace had approved and confirmed the agreement and the provision) constituted a "penalty" which is said to be void under Oklahoma law and that in such case the rest of the same sentence (which also contains the recently upheld right of withdrawal), providing for no other or further liability, must also fall. Accordingly it seems to be alleged that Occidental should be held monetarily liable for damages on account of any and all loss, injury or diminution suffered by the debtor's estate as a consequence of the fact that the prior plan was not consummated, particularly if Occidental could be said to have acted in "bad faith".

(g) Following Occidental's exercise of its right not to proceed with the prior plan of reorganization, the Judge repeatedly suggested that if affiant and certain other persons against whom the Trustee had asserted claims would assist in financing the plan of reorgani-

zation propounded by Western Oils, Inc. (which was the subject of the hearings on the 23rd and 24th of January at which the specific statements showing personal bias and prejudice were made), then the Court would take such action into consideration in deciding whether to order suits to be filed, and presumably would not order or permit such suits to be filed if sufficiently substantial services or assistance had been rendered to the debtor in effectuating the Western Plan of reorganization. Accordingly affiant, on behalf of Occidental, undertook to assist Western, at the initiative and urging of one Hayutin, to borrow two million dollars from the California Bank, in the form of one loan of one million seven hundred thousand dollars from the Bank, together with a separate and additional note for three hundred thousand dollars to be guaranteed by Occidental. Certain conditions were attached to the extension of said loan. In these hearings the Judge reacted to these conditions by calling them "unsavory" and "shocking," and complaining that they were unreasonable, unconventional, and impossible for the debtor to meet, would inevitably precipitate further insolvency, and were designed to have that effect, demanded more favorable loans, terms and conditions, or monetary assistance for the Western's plan, adverting to prosecution of the trustee's claims against Occidental and others as an imminent alternative.

It is against this background, and in the context of these circumstances, that the full import and significance of the various statements and remarks, and the fact that they demonstrate personal bias and prejudice against affiant and Occidental, becomes apparent.

(h) At these hearings, the judge described the trustee's alleged monetary claims against Occidental (which the Judge is to hear and decide) as admittedly

based on the theory that the Plan's $25,000 reimbursement provision is a "penalty", which is said to be void under the Oklahoma law, and that this invalidity in turn renders the withdrawal provision, which is part of the same sentence, entirely void (a theory entirely inconsisfent with the Court of Appeal's decision upholding that provision).

The judge has also expressed his views on the merits of the question by declaring his opinion that the claims asserted against Occidental—a matter on which there is yet to be a hearing—have a value in excess of a million dollars, saying:

"If Mr. Hammer put up the whole million dollars of equity capital and had a million dollars worth of this stock he would be getting out from under an obligation that if the stock was worth nothing he would be very fortunate. Not only that, he would be making money." T. 97.

• • •

"This estate, if you take it, Mr. Barnholt, you've got another asset, and that is whatever Mr. Hammer's liability is to it. And I consider that liability very real." T. 138.

• • •

On the merits of the so-called claim to subordinate Occidental's preferred stock, he said:

"We have always considered, and I have, that he (Hammer) didn't own the two hundred and forty thousand shares, because I've always felt that he couldn't walk away from this court with it; that the damages would far exceed whatever his interest was. The trustee has a motion on file to subordinate it, or something. What is that?

Mr. Irvin: Yes, sir; to subordinate his stock.

The Court: That is the reason I haven't considered that he had any." T. 127.

• • •

"I felt that the stockholders, since they hadn't financed it had three and a half years to do it had lost their equity of redemption, and here *I find that one of the prefered stockholders, two hundred and forty thousand shares of common stock, but if it is worth just a dollar in these combined companies, that gives him two hundred and forty* thousand dollars that I don't think he ought to have.*" T. 131.

• • •

Prejudice and prejudgment upon the trustee's allegation that Occidental has "slandered" the debtor's property appears in the following statement:

"I had ordered not to let anybody on the lease, and *I ordered that for the reason that, as you say, those properties have been slandered.* And I didn't want anybody to be in a position to express an opinion from an actual test." T. 42.

• • •

The personal and inflexible nature of the Judge's bias and prejudice appears in the following statements:

"You're not going to be able to talk me out of anything. It is just what can you do. I'm not going to change my mind on any of this. *I couldn't be hoodwinked into changing my mind about the conclusions that I have come to about Hammer at all.* I don't *want my intelligence impugned.* If you have got something you can do and want to say, 'I can do this,' I'll listen to you, but there is no use in your making an argument to me. You can't sell me a nickel's

* Emphasis in all instances is supplied.

worth of anything. *I've got my mind made up and I know what the facts are about this whole deal.* I am just as sure as if they were written up there in blood on the wall where we could see them." T. 92-93.

• • •

". . . This rule I follow, that living a long time has taught me is true, is that whenever, for example, anything comes up in any transaction where you think a man gets out of line, is to stop doing business with him then. My idea was at a certain time, which I announced to everybody, that I would stop doing business with Mr. Hammer from that standpoint." T. 99-100.

In considering the statements of the Court, it must be remembered that the names "Hammer" and "Occidental" are interchangeable as far as the Court is concerned and are so employed throughout the transcript; as the Judge himself said:

"Of course, Hammer is Occidental in any of his actions here . . ." T. 148.

The Judge's response to the conditions proposed for protecting the bank's two million dollar loan are so over-wrought, and his suspicions so slanderously worded and incessantly repeated as to show plainly his personal bias and prejudice, as exemplified in the following illustrative statements:

". . . *they are trying to, in my opinion,* step in here and *choke this company to death for the benefit of somebody else so that they can milk it and so forth.* I intend to say it from the bench, because I verily believe it to be true, and I believe it to be my obligation to do so. That is not going to hurt any other bank loan. And this bank, if it is goinng to loan this company money, and it is managed by Mr. Hammer, I would be fearful, if I were Western, and Mr. Barn-

holt, I'd be fearful of letting them do it. I know he is in one heck of a shape, and he's willing to do anything to keep his company now that he is in this terrible condition brought about *solely* and I think *designedly*, to put him in a position where he would have to agree to anything. All the landmarks are there." T. 125-126.

• • •

". . . Mr. Barefoot . . . knows that I stated at that time that *this convinced me since my former experience with Mr. Hammer that most likely*, or it was entirely possible, *that it was his intention*, and *that these were not put in* here, these requirements, *in good faith, but to make it possible for one of two things to happen.* He would be in control of this company or be in a position to milk it. There are two ways to gobble up a company. One is to milk it and the other is to get yourself in control of it and oust the people who are in control of it." T. 61.

• • •

"*I came to the conclusion that Mr. Hammer and I'm still of that conclusion, hopes to milk it* and do it the other way rather than make a profit on the stock, *that he prefers to milk the company and take those nice assets and the drilling equipment* and the building, and anybody would have to have them that is in the oil business." T. 66-67.

". . . I realized that there is another asset that there has not been too much said about, and that is in South America, and that in a pinch that possibly could be sold. It is on the books for four or five hundred thousand dollars. And *in the event that there was any plan to milk this, and I have to always assume that it could be in Mr. Hammer's mind*, because I have to guard against every eventuality, then the next thing would be—well, it is on the books, I think

the testimony showed that it was—well, it used to be on the books at five million dollars because that's what they thought the actual cash value was. And they might just say, 'Well, the only thing we can do is just take what is on the books at,' and Mr. Hammer would give them that much for it." T. 67.

". . . for Western to place themselves in the hands of Mr. Hammer and losing control of the company, which, it would seem to me that the present officers and directors would not intend to be doing . . . unless they were in such a cramp that they were having their arm twisted. . . . I haven't closed my mind about it, but as we said the other day when we were here, when I learned that Hammer was the one who was delaying it by requiring an extra test of the well, instead of the bank, then *I said to Mr. Hayutin, "Your partner is doing this* and you have stated that you didn't know that he was. *He is maybe double-crossing you."* Now, it could still be possible that that is true. Mr. Hayutin, however, as he stated this morning, has known Mr. Hammer a long time, and if Mr. Hammer's mind works like that, whether he is on notice would depend on how naive he is, and whether Mr. Barnholt is on notice of right where he was about to jump depends on how naive he is." T. 74.

• • •

"In looking at this picture of Western and Parker, the goodies down there are unmortgaged and they are real nice and are really liquid at forced sale. They're worth twice as much to keep and they are nice properties to own. I felt that somewhere *it could be possible that Mr. Hammer got the idea*, 'I'm not going to make my money off of the equity capital I put in here. *I'm going to make it off of milking it* where I don't have to share it with anybody.'" T. 75.

• • •

"I stated to him that *all of the earmarks were* on here of Mr. Hammer desiring to have control of this company, by requiring the delay and *wanting to delay it six weeks more*, which would have put it right up to about now, to get other tests, that he would have the Western in a position where before the 30th they couldn't go anywhere else and get the money. I am sure that it is pretty hard, after you have negotiated with one bank and they have withdrawn from a loan, to get it at all from another bank. And, unquestionably, the company would be in that shape; whether they knew it or not, I know it as an experienced lawyer. And I know that *they had either wittingly or unwittingly put themselves in what we call in Oklahoma, "The Wewoka switch." They were right up against the cold steel.*" T. 60.

The zeal exerted to persuade Occidental into financing Western's plan of reorganization on Judge Chandler's terms, and the recurring and accompanying references by the Judge in this context to the implied relationship and assumed value of Occidental's asserted but as yet unadjudicated liability, are such as to virtually raise a disqualifying conflict of interest, and by their number and repetition illustrate the Court's preoccupation with his personal animus against Hammer. For example:

"Mr. Barefoot: . . . *Your Honor made this statement* in effect that—*you turned to Mr. Haynie and staid, 'Now, go out and get me that two and a half million dollars and make Dr. Hammer help you'*

"The Court: *That is right.*" T. 13.

In this connection see also T. 13, 14, 99, 100, 124, 125, 135, 136.

• • •

5. Additional and particular facts and reasons for the belief that said personal bias and prejudice exist are the following statements of Judge Chandler at and in the record of, the hearings on the 23rd and 24th of January:

(a) Judge Chandler made repeated remarks about Hammer's "ethics" and "morals", questioning Occidental's motives and good faith in exercising its right of withdrawal, etc., and expressing resentment and censure at Occidental's exercise of its unquestionable and judicially confirmed contractual right to withdraw from the earlier plan. He stated in substance:

That Occidental withdrew from the prior plan "arbitrarily". T. 11.

That there were "indications" that Occidental didn't intend to go through with the Plan at the very time that Judge Wallace confirmed it. T. 11.

That if Occidental had lost its earlier appeal it would just have to pay damages and Judge Chandler would have to find, because his "feeling about *the question of his (Hammer's) good morals and walking away from the proposition* was in my mind something that I couldn't approve him as a managing officer of a company". T. 69.

That he stated he thought that maybe Occidental had withdrawn just to get the cash payment reduced, that he took the position Hammer couldn't get this by "backing out of that deal", and that unless he (Hammer) went through with the deal "just like it was and quickly", that would put doubt in the Judge's mind as to "his (Hammer's) good faith to begin with". T. 12.

That he came to the conclusion that Occidental's "money was all committed and he (Hammer) just didn't have enough to pay in or he would have paid it in. There was indication of that. I don't recall what the evidence was". T. 12.

That he took the position "and *told everybody connected with it*" that since Hammer had not paid the money in (i. e., *since Occidental had withdrawn*) he would never have this company directly or indirectly "because the Court would feel that *his action was such that it likely would be improper for me to turn it over to anybody whose integrity I even doubted*". T. 12.

Speaking of his unwillingness to have Occidental or Hammer have "anything to do with the company" to which he would turn over the stockholders, he said: ". . . I would have a responsibility to feel that I had placed the stockholders of this company in the hands of *good people who at least might lose their money, but they would do it conscientiously and they might even do it from mismanagement but they would not do it from a lack of ethics.*" T. 15.

* * *

In my opinion the most flagrant example of personal bias and prejudice exhibited by the Judge is the following:

"That all goes back to my feeling all along that I couldn't again, and I never did, except for a short time, do business with Mr. Hammer. I tried here in the presence of all of the people to get him to go ahead and go through with the deal, and I thought maybe I had him talked into it. He is a charming gentleman, but he didn't go through with that deal. Then *I had to come to the conclusion since he walked away from that one and during the conferences that I was having then the information came to me that could be construed to mean that when he agreed to it—to the Court confirming the plan that he intended right then at that certain date to write the check for twenty-five thousand dollars and walk away from it.* As soon as I found that I couldn't talk him into going

through with the plan, I made the statement that I couldn't ever let him, if he would come in thereafter and say, 'Now I'm ready to go through with Occidental—' In other words, that appeal in the Court of Appeals, if he lost it, he could not then come in and say, 'Well, I'm ready to go through!' *He would just have to pay the damages, because I would have to find that, because of my feeling about the question of his good morals and walking away from the proposition was in my mind something that I couldn't approve* him as a managing officer of a company that I would turn these properties over to." T. 68-69.

* * *

The Judge's intransigent attitude toward the Court of Appeals' decision vindicating Occidental's rights of withdrawal is shown by the following quotation (in the Judge's own words) of the Trustee's valued claim, which warrant repetition here:

". . . the trustee thinks that when the hearing is had that it will turn out that the twenty-five thousand dollars is a penalty and, therefore, illegal under Oklahoma law and, therefore, void. Then, *if that clause is void, the entire provision about the withdrawal would, therefore, be void because it is all in the same sentence.*" T. 15.

* * *

6. Affiant further avers that contrary to the Judge's statements Occidental entered into the prior plan of reorganization, as originally confirmed by Judge Wallace, in good faith and exercised its right of withdrawal because it believed it had a legal right to so do and on the grounds heretofore stated in the notice of withdrawal.

Affiant further avers that the conditions imposed by the United California Bank in connection with its pro-

posed loan were imposed by the Bank for its own business protection and for no other purpose. See page 11 of this affidavit referring to T. 92-93. In addition see T. 65 where the Court purports to say that deponent is in control of the United California Bank, a two billion dollar institution, which on its face is preposterous and contrary to the facts.

7. Your affiant has been informed by Mr. Berglund that he knows of certain proceedings in the latter part of January in 1962 before this Court, involving the merits of these proceedings at which neither your affiant nor his counsel were present. Your deponent was further informed that testimony was taken stenographically at these said hearings. It is elementary that any party in interest under our system of jurisprudence is entitled to have notice of and be present, either personally or through counsel, at any hearing at which his or their rights might be affected. As a matter of fact, the following took place on page 34 of the transcript of the hearing before the Honorable Stephen S. Chandler in open court on January 30, 1962:

"Mr. Barefoot: I want the record to show that if and when I ever believe I have reached that situation I, of course, will do something about it.

"I want, at this time, in open court, to request a copy, or several as I will notify the reporter, of everything that he has reported during the past two weeks in connection with the Parker Petroleum Company matter, whether it be in the courtroom, chambers or elsewhere.

"The Court: You will get, I am sure, as soon as he can get it out."

It is therefore respectfully requested and demanded that transcripts of any hearings not as yet released by this court be immediately ordered to be released and furnished your deponent and Occidental Petroleum and be made part of this application so that complete justice may be done. It is elementary under our system of jurisprudence that

parties to any proceeding be furnished with copies of the entire record. Your deponent and Occidental will pay the proper charges for the same.

8. Affiant further avers that in view of the aforesaid statements and attitude of the Judge as heretofore made known and reported to him, he verily believes that neither he nor Occidental Petroleum Corporation can possibly receive a fair and impartial hearing before the said Judge, or fair and impartial treatment from him, and that in view of the aforesaid personal feelings (as distinguished from opinions) and personal bias and prejudice he believes to be adequately reflected in the foregoing statements and excerpts, affiant believes that the Judge has formed a preconsidered judgment about the background, facts and law affecting the pending matters, and further in the opinion and the belief of affiant has formed such conclusions on the basis of information or statements outside of the record in these proceedings (since no adequate basis in the record for certain opinions and factual statements set forth in the transcript is known to your affiant), or on the basis of personal bias and prejudice engendered by the reversal of his prior order. Affiant further avers that in view of the foregoing facts and statements he believes that the Judge is so incensed by the failure of the prior plan as the result of the reversal of his prior ruling or has been so deeply preoccupied with the over-riding purpose of effectuating the present Western plan of reorganization at the time of these hearings during the month of January, that he sees Occidental as a scheming enemy behind the debtor's difficulties. Affiant further avers that under such circumstances and in view of the aforesaid statements it appears that it would be humanly impossible for this Judge to eliminate the personal bias and prejudice heretofore shown so as to be able to fairly hear and decide the pending motions now set for hearing on March 13, 1962, or for purposes of hearing or deciding any other claims of any nature whatsoever asserted against Occidental in these Chapter X

proceedings, or orders or judgments the substance of which affect it other than as one member of the class of preferred stockholders.

WHEREFORE, affiant demands that the Hon. Stephen S. Chandler proceed no further on this cause, and that another Judge be assigned to hear this action.

OCCIDENTAL PETROLEUM CORPORATION
OF LOS ANGELES

by ARMAND HAMMER
Armand Hammer, *President*

Subscribed and sworn to before me this 2nd day of March, 1962.

My commission expires April 24, 1963.

MARIE N. BORGES
Notary Public

CERTIFICATION

The undesigned, counsel of record for Occidental Petroleum Corporation, hereby certify that the foregoing Affidavit of disqualification of Hon. Stephen S. Chandler is made in good faith.

HOWARD W. REA
Howard W. Rea
Lewis, Grant & Davis
818-17th Street
Denver 2, Colorado

s/ BERT BAREFOOT, JR.
Bert Barefoot, Jr.
Barefoot, Moler & Bohanon
1405 Liberty Bank Building
Oklahoma City 2, Oklahoma

APPENDIX B

District Court Order Rejecting Application for Disqualification

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF OKLAHOMA

No. 10,807

In Proceedings for the
Reorganization of a Corporation

In the Matter of

PARKER PETROLEUM CO., INC., a corporation, *Debtor*.

ORDER

Upon consideration of the Application and Affidavit for Disqualification filed herein by Occidental Petroleum Corporation and Armand Hammer, its President, the Court finds the allegations contained in the Application and Affidavit of applicants that he is disqualified to hear this matter because of personal bias and prejudice against Occidental and Hammer to be insufficient, and states that all of the statements set out in the affidavit are findings and conclusions reached from consideration of evidence presented in these proceedings; that the Court never knew or had an opinion regarding the parties prior to his assignment to hear this proceding and could not, did not and does not now have any such personal malice or prejudice against said parties as is contemplated by 28 U.S.C. § 144. That many of the statements in said affidavit are taken out of context and none of the statements could be understood except in connection with all of the facts and circumstances appearing in this proceeding to date, including the transcripts of January 23, 24 and 30, 1962; and that under the law, conclusions reached and opinions stated by the Court from evidence in the proceedings do not and could not constitute such grounds for disqualification as are contemplated by 28 U.S.C. § 144.

The Court further states that prior to the filing of the motion to disqualify, he had asked the Honorable Paul Duncan, Special Master, to hear the matters involving applicants, and counsel for applicants were so advised on March 3, 1962, by the attorney for the Trustee, with the further statement that if they preferred that such matters be tried by another judge instead of the Special Master, that such matters would be assigned to another judge of the court for trial and determination. This Court has at no time shown a disposition to the contrary. The Court did not have at the time of filing of the affidavit, and does not now have any intention of trying or deciding any question of fact in this proceeding involving applicants.

In view of the facts, there was and is no question of disqualification to be determined since the Court had no intention of hearing and determining such matters. The affidavit is therefore adjudged to be legally insufficient.

Chief Judge

APPENDIX C

Opinion of Court of Appeals for the 10th Circuit and Order of 10th Circuit Judicial Council

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

On Petition for Writ of Mandamus or Prohibition

No. 6972—March Term, 1962

Occidental Petroleum Corporation, *Petitioner*,

v.

Hon. Stephen S. Chandler, United States District Court Judge for the Western District of Oklahoma, *Respondent*.

In the Matter of

Parker Petroleum Co., Inc., a Corporation, *Debtor*.

In Proceedings for the Reorganization of a Corporation. No. 10807

Bert Barefoot, Jr., and Howard M. Rea for Petitioner.

Francise S. Irvine for Respondent and for Trustee of Parker Petroleum Co., Inc.

V. P. Crowe, Phil Daugherty and Roy Lytle for Respondent.

Earl A. Brown for Common Stockholders of Parker Petroleum Co., Inc.

G. C. Spillers for Webster Drilling Company.

Frank A. Bruno for Western Oil Fields, Inc.

Kirk Windle for United States Securities and Exchange Commission.

Gene M. Gardner for Protective Committee of Creditors.

Delmar L. Staggner for Certain Unsecured Creditors.

Herbert F. Hewett for John S. Bottomley and C. J. Hoffman.

Before MURRAH, Chief Judge, and PICKETT, LEWIS, BREITENSTEIN and HILL, Circuit Judges.

Per Curiam.

Occidental Petroleum Corporation petitions for a writ of mandamus or prohibition to prevent the Honorable Stephen S. Chandler, Chief Judge of the United States District Court for the Western District of Oklahoma, from proceeding further in a Chapter X bankruptcy proceeding pending in that court and involving Parker Petroleum Co., Inc. The basis for the petition is the claimed disqualification of the Judge. The original petition sought the removal of the Judge from those parts of the proceedings directly affecting Occidental. An amended petition seeks the removal of the Judge from the entire proceedings. We have heard the matter on the petition, the amended petition, the response, the evidence adduced at three days of hearing, the briefs, and the oral arguments. Counsel have appeared and been heard not only for the petitioner and respondent but also for others having an interest in the bankruptcy proceedings.

The jurisdiction of this court is questioned on the ground that a ruling on a motion for disqualification made under 28 U.S.C. § 144 is reviewable only on appeal and that the All-Writs Statutes, 28 U.S.C. § 1651, does not apply. The facts alleged and proved established this case as an exceptional case in which the preservation of the right to fair and impartial hearing and disposition requires the exercise of our jurisdiction at this time. The question of the disqualification of a trial judge was presented in United States v. Ritter, 10 Cir., 273 F.2d 30, 32, and we held that we have the "power and inescapable duty" to act and that it makes no difference whether such power is conferred under the All-Writs Statute or under the inherent powers

of a United States Court of Appeals "to effectuate what seems * * * to be the manifest ends of justice." Application to the United States Supreme Court for relief from our action in the Ritter case was denied. 362 U.S. 946.

From the record made before us we find and conclude:

1. The Judge has conducted "closed-door hearings, meetings and discussions in chambers" at which some but not all of the interested parties were present at the invitation of the Judge and from which the attorneys for some of those present were excluded with the direction of the Judge that the fact of such proceedings and the matters which transpired therein should not be reported to those attorneys. At these hearings, meetings and discussions matters pertaining to the bankruptcy estate and materially affecting not only those present but those excluded therefrom were considered.

2. After the filing of the petition in case No. 6972, the Judge tried to prevent a court officer from the performance of his official duties and responsibilities in matters relating to the bankruptcy estate.

3. The Judge has a personal enmity, hostility, bias, and prejudice against Occidental and cannot therefore fairly and impartially hear and determine any matter involving Occidental.

4. The proper administration of justice requires that all further proceedings in connection with the Parker bankruptcy be heard and determined by another judge.

It is therefore ordered that the Honorable Stephen S. Chandler, respondent herein, shall proceed no further in the matter of Parker Petroleum Co., Inc., Debtor, No. 10807 Bankruptcy on the docket of the United States District Court for the Western District of Oklahoma, and that all further proceedings in said cause No. 10807 Bankruptcy shall be heard and determined by a judge to be designated

by the Chief Judge of the Tenth Circuit of the United States.

This disposition of the matter makes it unnecessary to determine the issues raised by the petition of the Trustee of Parker Petroleum Co., Inc., for a modification of the stay order entered herein on March 14, 1962.

The Clerk of this court is directed to forthwith transmit a copy hereof to the Clerk of the United States District Court for the Western District of Oklahoma for filing in its case No. 10807 Bankruptcy.

In the Judicial Council of the Tenth Circuit of the United States

SPECIAL SESSION—APRIL, 1962

IN THE MATTER OF THE PROCEEDINGS IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA FOR THE REORGANIZATION OF PARKER DRILLING CO., INC., DEBTOR, DOCKET NO. 10807 BANKRUPTCY.

ORDER

On May 6, 1958, Parker Petroleum Co., Inc., filed in the United States District Court for the Western District of Oklahoma a petition for reorganization under Chapter X of the Bankruptcy Act, said cause being docketed in that court as No. 10807 Bankruptcy. A Trustee was appointed. No plan of reorganization has been consummated. Actions taken in the proceedings have resulted in two appeals, docket Nos. 6460 and 6510, which have been heard and determined by the United States Court of Appeals for the Tenth Circuit.

On March 6, 1962, Occidental Petroleum Corporation filed in the said Court of Appeals its petition for a writ of mandamus or prohibition to prevent the Honorable Stephen

S. Chandler, Chief Judge of the United States District Court for the Western District of Oklahoma, from proceeding further in the Parker bankruptcy matter, said petition being docketed as No. 6972. Later an amended petition and a response were filed. The issues raised were heard by a panel consisting of Chief Judge Murrah and Circuit Judges Pickett and Breitenstein on March 12 and 13 and April 10, 1962. Evidence was received and arguments presented by the petitioner, the respondent, and others interested in the Parker bankruptcy. At the conclusion of the April 10 hearing the sitting judges determined that the issues raised as to the qualifications of the Honorable Stephen S. Chandler to proceed further were of such a serious nature that the matter should be presented to the Judicial Council of the Tenth Circuit of the United States.

Thereafter, the respondent by identical telegrams addressed to each active member of the court requested a hearing en banc. Pursuant to such request and to notice to all parties in interest, the court met en banc on April 20, 1962, and heard further statements of counsel. At such hearing on April 20, all parties present consented to the consideration of the case by the court en banc on the record as then made and as previously made. At the conclusion of the en banc hearing the court affirmed the determination of the previously sitting judges that the issues raised as to the qualifications of the Honorable Stephen S. Chandler to proceed further were of such a serious nature that the matter should be presented to the Judicial Council of the Tenth Circuit of the United States.

The Judicial Council of the Tenth Circuit met at Denver, Colorado, at 11 a.m., Friday, April 20, 1962, with all members present. By the direction of the Judicial Council the clerk of the court had notified the Honorable Stephen S. Chandler that it was the wish of the Council that he appear if he could conveniently do so. The Honorable Stephen S. Chandler did not appear at the Council meeting.

The Judicial Council having considered all matters presented to the court in case No. 6972 now finds and concludes:

1. The Judge has conducted closed-door hearings, meetings and discussions in chambers at which some but not all of the interested parties were present at the invitation of the Judge and from which the attorneys for some of those present were excluded with the direction of the Judge that the fact of such proceedings and the matters which transpired therein should not be reported to those attorneys. At these hearings, meetings and discussions matters pertaining to the bankruptcy estate and materially affecting not only those present but those excluded therefrom were considered.

2. After the filing of the petition in case No. 6972, the Judge tried to prevent a court officer from the performance of his official duties and responsibilities in matters relating to the bankruptcy estate.

3. The Judge has a personal enmity, hostility, bias, and prejudice against Occidental and cannot therefore fairly and impartially hear and determine any matter involving Occidental.

4. The effective and expeditious administration of the business of the United States District Court for the Western District of Oklahoma requires that all further proceedings in connection with the Parker bankruptcy be heard and determined by another judge.

Accordingly, pursuant to the power and authority of the Judicial Council under the Act of June 25, 1948, c. 646, § 332, 62 Stat. 902, 28 U.S.C. § 332, it is ORDERED that the Honorable Stephen S. Chandler shall proceed no further in the Matter of Parker Petroleum Co., Inc., Debtor, No. 10807 Bankruptcy on the docket of the United States District Court for the Western District of Oklahoma.

The Judicial Council respectfully requests the Honorable Alfred P. Murrah, Chief Judge of the United States Court of Appeals of the Tenth Circuit, to designate and assign a United States District Judge to hear and determine all further proceedings in the Matter of Parker Petroleum Co., Inc., Debtor, No. 10807 Bankruptcy.

An original copy of this order shall be retained in the records of the Council. A duplicate original shall be forthwith transmitted to the Clerk of the United States District Court for the Western District of Oklahoma to be filed by him as a part of the record in No. 10807 Bankruptcy.

Done by the Judicial Council of the Tenth Circuit this 20th day of April, 1962.

ALFRED P. MURRAH
Chief Judge

JOHN C. PICKETT
Circuit Judge

DANA T. LEWIS
Circuit Judge

JEAN S. BREITENSTEIN
Circuit Judge

DELMAR C. HILL
Circuit Judge

Office-Supreme Court, U.S.
FILED
DEC 18 1962

IN THE

Supreme Court of the United States

October Term, 1962

No. 563

HONORABLE STEPHEN S. CHANDLER, UNITED STATES DISTRICT JUDGE FOR THE WESTERN DISTRICT OF OKLAHOMA,

Petitioner,

v.

OCCIDENTAL PETROLEUM CORPORATION,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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I

The petition misstates the case.

The petition for certiorari wholly misstates the proceedings and subject matter before the Court of Appeals and the Judicial Council, and also their determinations and findings, the evidence which made those findings inescapable and urgent, and the powers (statutory and inherent) under which they made their determinations.

The actual subject matter was not bias alone but *overt judicial misconducts*,—misconducts so shocking and so vio-

lative of law and judicial propriety as to render the Judge's removal an inescapable duty, whether that duty and the power to fulfill it be found in the all-writs statute (28 U. S. C. §1651), or in the inherent scope of appellate jurisdiction to effectuate the manifest ends of justice, or in the function conferred by 28 U. S. C. §332 on each Judicial Council to "make all necessary orders for the effective and expeditious administration of the business of the courts within its circuit", and to require the district judges to "promptly carry (them) into effect".

After full hearings and taking of testimony on four days, with all parties in interest participating and Judge Chandler represented by counsel, the Court of Appeals and the Judicial Council, both sitting *en banc* with five judges at Judge Chandler's own request, unanimously made the following findings (23a-29a):

> "1. The Judge has conducted 'closed-door hearings, meetings and discussions in chambers' at which some but not all of the interested parties were present at the invitation of the Judge and from which the attorneys for some of those present were excluded with the direction of the Judge that the fact of such proceedings and the matters which transpired therein should not be reported to those attorneys. At these hearings, meetings and discussions matters pertaining to the bankruptcy estate and materially affecting not only those present but those excluded therefrom were considered.
>
> 2. After the filing of the petition in case No. 6972, the Judge tried to prevent a court officer from the performance of his official duties and responsibilities in matters relating to the bankruptcy estate.

3. The Judge has a personal enmity, hostility, bias and prejudice against Occidental and cannot therefore fairly and impartially hear and determine any matters involving Occidental.

4. The proper administration of justice requires that all further proceedings in connection with the Parker bankruptcy be heard and determined by another judge."

In the Judicial Council's order paragraph 4 *supra* reads (28a):

"4. The effective and expeditious administration of the business of the United States District Court for the Western District of Oklahoma requires that all further proceedings in connection with the Parker bankruptcy be heard and determined by another Judge."

Ironically, these decisive findings receive in the present petition only three lines of cursory narrative mention and paraphrase (p. 6). Thereafter they drop out of sight.

The petition makes no attempt whatever to controvert those findings factually, or to excuse such gross judicial misbehaviors and acts of fixed hostility.

Those findings and the facts which they express with judicial restraint made any other result inconceivable, and exclude any merit in this petition.

The emergency was immediate and inescapable. Temporizing would nullify due process of law throughout the whole future of the case.

Hence, for the sake of realism and to thwart diversion from actualities, we shall set forth the actual facts. The petition has handled them by disregarding them.

II

Summary of Argument

The facts stated in Occidental's petitions to the Court of Appeals and proven without contradiction at its hearings on March 12 and 13 and on April 10 and 20, 1962 establish:

(1) For some months previously Judge Chandler had been conducting repeated hearings in chambers affecting and directing the procedure and merits of the reorganization proceedings. In such in-chambers proceedings he had repeatedly expressed violent and abusive prejudgment and antipathy as to the rights and actions of Occidental, a highly interested party; had constantly denounced Mr. Hammer, its president, in extremely indecent and slanderous language; had personally ordered that Occidental and its attorneys be given no notice thereof and be excluded therefrom; and had personally directed that they not be allowed to procure copies of the official transcripts recorded by the official court stenographer.

(2) Even after the filing of the affidavit of disqualification Judge Chandler continued to act, and in his order of March 9 he evaded the requirements of the statute (28 U. S. C. §144) by referring to a conversation which he said he had with a third person that he intended to disqualify himself as to "*any question of fact*" involving Occidental or Hammer (21a, 22a).

(3) When the court stenographer received the subpoena from the Court of Appeals for the production of his rec-

ords of the in-chambers proceedings, Judge Chandler seized them by order to the stenographer, and by threats endeavored to have him testify falsely as to his non-possession of them, the role in which he had acted, and the nature of the in-hearing proceedings.

(4) In the face of these very serious charges of judicial misconducts, made in Occidental's petitions and in the testimony of the official stenographer, and in the face of the scandalous revelations when the official transcripts were finally made available to the Court of Appeals, Judge Chandler replied to Occidental's petition with an "answer" wholly illusory, and replied to the proof before the Court merely with evasive communications addressed not to the Court but to third persons,—at the same time refraining from appearing in the Court of Appeals.

(5) Several days after the hearing on April 10 closed with the agreement of all present that "the Court regard this matter as finally submitted for decision" (Tr. 45), Judge Chandler requested by telegram a "hearing *en banc*", and that "further delay be avoided" (Hearing April 20, Tr. 3, 4). The Court "conferred immediately", and arranged for the earliest possible day on which five judges could assemble from this huge Circuit, namely Good Friday, April 20; and invited Judge Chandler to be present. But instead of his appearing, his new counsel arose after the five judges had ascended the Bench, and stated that the Judge had become occupied with another matter, of the nature of which counsel had not been informed (Tr. 32-34). Thereupon nothing was submitted; and the Judge's counsel excused himself from making any argument because he

had time only to read the record "hurriedly" (Tr. 28). All counsel then agreed that the decision *en banc* be made on the record "as it has already been produced and transcribed" (Tr. 9-11).

(6) The facts were pregnant with the decision. The integrity of the administration of justice was critically and urgently at stake. Furthermore, immediate action was necessary to protect the Court's ultimate appellate power over the reorganization proceeding.

If precedents for the obvious add anything, they are *a fortiori*: *LaBuy* v. *Howles Leather Co.*, 352 U. S. 249, 254-5; *United States* v. *Ritter*, 273 F. 2d 30 32 (10 Cir.), cert. den. 362 U. S. 946; *McClellan* v. *Carland*, 217 U. S. 268, 280; *Ex Parte United States*, 287 U. S. 241, 246.

III

The secret proceedings by Judge Chandler in chambers, and Occidental's petitions to the Court of Appeals

(1) Occidental had 40,000 of the 140,000 shares of preferred stock of the bankrupt Parker Petroleum Co. (Hearing by Court of Appeals, March 13, Tr. 88-9).

On February 7, 1961, the United States Court of Appeals reversed an order made by Judge Chandler imposing large liability on Occidental in the Parker bankruptcy; and on April 11, 1961, it denied "petitions for rehearing and clarification". *Occidental* v. *Walker, Trustee*, 289 F. 2d 1 (10th Cir.).

On February 1, 1962 in the Parker bankruptcy proceeding, Francis S. Irvine, counsel for the Trustee of Parker

Petroleum Co. and later also for Judge Chandler herein, said (as he admitted in the Court of Appeals) to Bert Barefoot: "Judge Chandler has asked me to tell you this, and I tell you nothing more". The "this" was that neither Barefoot nor Fellers (counsel for Occidental) was "to communicate with Judge Chandler concerning any matter involving the Parker Petroleum Company matters" (Hearing by Court of Appeals, March 13, Tr. 80-3).

On March 2, 1962, Occidental and Armand Hammer, its president, applied to Judge Chandler upon an extended and detailed affidavit under 28 U. S. C. §144 to disqualify himself from hearing and deciding certain matters then pending before him, including a motion set for hearing on March 13, and designating another judge pursuant to 28 U. S. C. §292(b) (R. pp. 2-ll-ffh). Certification to the good faith of the application was made by Howard W. Rea and Bert Barefoot, Jr., as counsel (R. p. 2-hh).

That affidavit, quoting from the transcript of proceedings before Judge Chandler on January 23 and 24, 1962, and obtained by Occidental on February 26, set forth many instances where the Judge had expressed extreme hostility and antagonisms to Occidental and Hammer, its president: had assailed their ethics, morals and good faith; had accused them of "double-crossing" and of trying to "choke this company to death for the benefit of somebody else so that they can milk it"; had declared: "I couldn't be hoodwinked into changing my mind about the conclusions that I have come to about Hammer at all", and "I've got my mind made up": had voiced prejudgments adverse to Occidental; and had manifested determined resistance to the interpretation of Occidental's rights in the aforesaid decision of the Court of Appeals reversing him (289 F. 2d 1).

On March 6, having been informed that the Judge was continuing to act (R. p. 2-c) and that there had been secret hearings in chambers from which Judge Chandler had excluded it and denied its right to transcripts, Occidental filed with the United States Court of Appeals a petition for a writ of mandamus and/or prohibition restraining the Judge as to matters affecting Occidental (R. pp. 2 hh).

That petition, verified by Hammer, stated on information and belief that in late January or early February Judge Chandler had conducted in chambers crucial proceedings in which he sat as "The Court", the court's official stenographer recorded verbatim, and the merits of the cause and the rights of the parties were considered and acted upon; that by the Judge's direction neither Occidental nor its counsel was given notice thereof; that, in accordance with its rights under 28 U. S. C. 753(b) and (c), Occidental had repeatedly requested copies of the official transcripts and had offered to pay for them; but that (R. pp. 2-c-d):

> "the Court Reporter has been instructed and advised to deny to Petitioner's counsel Bert Barefoot, Jr., copies of transcripts of any such proceeding at which he was not present, including hearings affecting the merits of this controversy of which he was not given notice and from which he was excluded."

The petition further stated that Occidental should forthwith have such transcripts, and (R. p. 2-d):

> "also should be entitled to rely upon any and all statements that might be cited as showing personal bias and prejudice made at any hearing or hearings had in these proceedings during January and February of 1962 at which testimony was taken, stenographic transcript

was had, and of which transcripts have heretofore not been available to Petitioner or its counsel, notwithstanding its repeated requests to obtain the same."

The petition then recited pending matters before Judge Chandler in which Occidental was directly interested, and in which he continued to act judicially and hostilely notwithstanding Occidental's application to disqualify himself (R. pp. 2e-h).

(2) On March 6 the Court of Appeals issued to Judge Chandler an order to show cause, with a stay, returnable before it on March 12 (R. p. 3).

On March 7 the order was served (R. p. 4); also a written statutory request for the transcripts was filed by Occidental pursuant to 28 U. S. C. §753(b) (Hearing by Court of Appeals, March 13, Tr. 78).

On March 9 Judge Chandler filed in his court an "order" which evaded denial of the secret hearings but adjudged "legally insufficient" Occidental's application for disqualification (21a). His "order" recited that he had no "intention of trying or deciding *any question of fact* in this proceeding involving applicants" (21a). (Emphasis ours.) He neither disqualified himself nor assigned another judge; but referred to what he said he had conversationally told a "special master." The wording was a masterpiece of ambiguity and personal non-commitment.

On March 12, 1962, Judge Chandler's "answer" was filed in the Court of Appeals. It contained no denial whatever of the aforesaid private in-chambers hearings and actions, or of the petition's allegations as to their subject matter, or of the petition's quotations of Judge Chandler, or of his directions to exclude Occidental's attorneys and

to refuse them the transcripts. It was wholly illusory, and did little more than denounce Occidental's petition as "an abuse" and "an imposition", and pray dismissal (R. p. 4).

(3) On March 12 Occidental filed with the Court of Appeals a "petition for leave to amend and supplement petition for writ of mandamus and or prohibition" (R. pp. 5-a to w).

This second petition pointed out the artificialities and reservations of Judge Chandler's "order" of March 9; set forth additional judicial acts of hostility and impropriety; averred that on January 30, 1962, and, according to Occidental's information on other associated dates, Judge Chandler had held in his chambers secret hearings from which Occidental and its counsel were excluded and as to which copies of the transcripts were refused by the Judge's direction; and charged (R. p. 5-l):

> "Under such circumstances the Judge's action in setting a hearing, ordering depositions on injudiciously short notice, and denying transcripts of testimony to Petitioner and its counsel where the testimony on information and belief concerned the matters to be explored on deposition, all while there remain an unadjudicated Affidavit of Bias and Prejudice, not only constituted an improper exercise of jurisdiction prior to a determination on the said Affidavit, and a practical denial of its Affidavit (as well as its motion for a stay of depositions), but in addition constituted a refusal to enforce rules and statutes (*e.g.*, Section 753(b) of Title 28, United States Code)."

The petition concluded with prayers for orders by the Court of Appeals totally restraining Judge Chandler from acting further in the case, and (R. p. 5-r):

"3. Ordering and directing that no hearing shall be had or deposition taken of Petitioner and its officers and employees in this proceeding until Petitioner and its counsel have been furnished with copies of the transcripts of all proceedings, 'conversations' or 'conferences', in chambers or elsewhere, at which witnesses or parties were questioned and of which a stenographic record was taken, the same to be made available to Petitioner, pursuant to the terms of Sections 753(b) of Title 28, United States Code, forthwith."

IV

The agreement by Judge Chandler's counsel in the proceedings in the Court of Appeals that it "has this authority," *i.e.*, supervisory powers

On March 13, faced with Occidental's petitions and the shocking testimony of the official court stenographer on March 12, there was the following dialogue between the Court of Appeals and Mr. Francis S. Irvine, attorney for Judge Chandler (Hearing, March 13, Tr. 159):

> "The Court (Chief Judge Murrah): * * * This Court sits to exercise its supervisory powers, and there are plenty of cases, if you will refer to them in the books, from this Court, to illustrate that very point. We are not just sitting here to decide the legal sufficiency of an affidavit to disqualify a trial judge. We are sitting here in the exercise of our supervisory powers as a court, to determine whether or not in the whole matter of the proceedings here there should be some action on the part of this Court, in the exercise of those powers, which are undisputed. And in doing so, we apprehend that it goes beyond the mere legal sufficiency of an affidavit to disqualify.

Is that right?

The Court (Judge Pickett): Yes.

The Court (Judge Breitenstein): Surely.

The Court (Chief Judge Murrah): Now, I know that you act like you don't like it, but that's the way it is.

Mr. Irvine (Judge Chandler's Counsel): No, sir, I have no—I know that the Court has this authority; I agree with the authority.

The Court (Chief Judge Murrah): Very well, let's proceed. Proceed."

V

The hearing by the Court of Appeals on March 12, 1962, and the crucial testimony of Ingram, the official court reporter in Judge Chandler's court

The transcript of this hearing covers 51 pages, and is incorporated in this Record (pp. 7, 7a). All parties appeared by counsel. Judge Chandler appeared by Francis S. Irvine, his attorney (Tr. 2).

The first witness was Russell H. Ingram who testified that for nearly four years he had been "Official Court Reporter, United States District Court, Western District of Oklahoma", and had been "assigned to Judge Chandler" during the Parker Petroleum matter (Tr. 30, 31).

Irvine immediately objected to his testifying on the very ground (among others) that these "were private conferences held within the confines of the Judge's chambers" (Tr. 29).

The objection being overruled, Ingram testified that he appeared pursuant to subpoena out of the Court of Appeals, calling for him and all his records in the Parker

proceeding; but that he did not have his records for the hearings in chambers on January 20, 25, 29, 30, and February 2 (Tr. 32, 40), because on the previous day (March 11) and before he had made his transcriptions, Judge Chandler, with knowledge of the subpoena, took his notebooks from him under the following circumstances (Tr. 42-44).

Judge Chandler had telephoned him at 9:30 a.m. (March 11) to come to his home and bring "everything that I was going to bring to Denver". Ingram was kept there until 3:00 p.m. Paul Duncan, an attorney from Oklahoma City whom the Judge had appointed a Special Master (22a), also came there. Ingram had with him his notebooks "bundled up with a rubber band". The Judge "picked out the notes that they [Occidental] do not have a transcript of", and said: "All right. Now, I've had possession of these all this time" (Tr. 42-48). Thereupon:

> "Paul (Duncan) showed up and we went through this whole thing again, that they had been in his (the Judge's) possession. And also, they went through the idea that I had been acting as his secretary, that I wasn't an official reporter and that I wasn't entitled to the notes in the first place, and that that's what I'd testify to today. • • • Paul Duncan said: • • • 'If you want to take the notes, you can take them as a Judge.'
>
> "I went home and I was scared and I was confused and I was mad."

About 7:00 p.m. Ingram decided that he must be "a man or a mouse", and went back to the Judge's home and told him (Tr. 44-5):

> "I'm going to go out there (the Court of Appeals) and I'm going to tell the truth on what happened.

> I've got this subpoena from the Circuit Court, asking for everything that I had in my possession, and all that stuff was in my possession. * * * I'm going to say that they were taken."

Judge Chandler then told Ingram that if he had the notes he had them "illegally"; that "it wasn't a hearing or a proceeding"; and that somebody must have "got to me" and I had "sold out". "How much have they paid you?" Ingram reminded the Judge that he (the Judge) had personally instructed him "in chambers that they (Occidental) couldn't have them (the transcripts). The Judge then replied: "All right, boy, you're on your own. The only person you have to fear is me." Ingram answered: "Either I'm going to take those notes with me or you're going to order me not to take them"; and the Judge finally said: "All right, I order you not to take them" (Tr. 46-8).

Ingram further testified in response to a question from Barefoot, Occidental's attorney (Tr. 48):

> "I had been instructed not to furnish any transcript to you that you were not present at."

In response to a question by Judge Breitenstein, Ingram also testified that at that time he was on the federal payroll "as an official court reporter" and not "as a secretary" or "law clerk" (Tr. 50-1). Mrs. Thomas was the Judge's law clerk (Tr. 80).

The shocking facts thus narrated under oath by Ingram were never contradicted in any of the four hearings in the Court of Appeals. Neither Judge Chandler nor Paul Duncan ever personally appeared in the Court of Appeals.

Amazingly the instant petition for certiorari does not mention Ingram or his above testimony.

VI

The hearing by the Court of Appeals on March 13

(1). The transcript of this hearing covers 155 pages, and is incorporated in this Record (7, 7a).

Mr. Irvine read into the record a telegram sent him that day by Judge Chandler. Significantly it did not contradict Ingram's testimony of the day before, but evasively said (Tr. 55):

> "'Mr. Ingram's statement that I refused to permit him to take certain transcripts is correct. I advised him that they were notes of conversations that did not constitute hearings or proceedings contemplated by statute and could be obtained only upon request of parties present. I further advised him that when he took them from my desk to transcribe some of them at my request, they were legally still in my constructive possession and he must return them to me, which he did. I am sending them by courier, arriving Braniff flight 360, but am of opinion they could only be obtained by Occidental, Hammer, or Hayutin, in the event action brought against them by Western.' Signed: 'Stephen S. Chandler'."

Obviously "constructive possession" was no answer to a subpoena duces tecum from the Court of Appeals directed to the person who had the actual possession.

Mr. Irvine then admitted that he himself had been present at the private in-chambers proceedings, and that they had "pertained particularly to the Western plan of reorganization and the financing thereof" (Tr. 56-7). The prior decision of the Court of Appeals, 289 F. 2d 1, showed

how vitally Occidental would be interested in any plan of reorganization, and thus emphasizes the enormity of its exclusion from the judicial planning thereof.

(2) At the afternoon session March 13, Ingram's stenotype notes for the in-chamber proceedings on January 20, 25, 29 and 30 and February 2 having arrived, they were marked in evidence, without objection, as Occidental's exhibits 12, 13, 14, 15 and 16 (Tr. 179-184), such exhibits to include the transcriptions which the Court of Appeals directed Ingram to make as quickly as possible so as to be available for all counsel well in advance of a further court session which Irvine on Judge Chandler's behalf requested be held for briefing and oral argument (Tr. 186-7, 190-1). The Court stated (Tr. 191):

> "Of course, there would be no point in hearing any argument on the matter until we have the transcript of these minutes."

Ingram said that he could be ready in several weeks. The Court then recessed until April 10.

Ingram's transcriptions are now part of the present record before this Supreme Court and as a package are on file with its Clerk. They are marked with the same exhibit numbers as the stenotype notes from which they were transcribed, namely Petitioner's Exhibits 12, 13, 14, 15 and 16, and bear on the last pages Ingram's signed certificate of accuracy.

Amazingly the instant petition for certiorari does not mention these Ingram transcripts or their contents.

VII

The hearing by the Court of Appeals on April 10. What Ingram's transcripts finally revealed.

(1) The appearances were the same as before. The transcript covers 164 pages, and is incorporated in this Record (R. 12, 13).

Ingram's transcriptions of the stenotype notes then immediately revealed the reasons for Judge Chandler's directions to keep secret from Occidental these doings in chambers and also for his shocking conduct against Ingram after the subpoena from the Court of Appeals. Their accuracy has not been challenged. They total 785 pages.

In the first place, the transcripts record official proceedings.

Each is entitled "In the Matter of Parker Petroleum Co., Inc., a corporation, No. 10,807"; "Reporter's Transcript of Proceedings had in Chambers in the United States Court House"; "Before the Honorable Stephen S. Chandler, Chief Judge". Each recites the "Appearances" of the parties present. Those thus present varied, but the total "appearances" comprised Paul C. Duncan, "Special Master"; Francis S. Irvine, attorney for the Trustee; Richard M. Barnholt, president of Western Oil Fields; Harold R. Berglund, a vice-president and director of Western Oil Fields; J. Kirk Windle, attorney for the S. E. C.; Earl Brown, attorney for Orville Parker; F. A. Bruno, attorney for Western Oil Fields.

In the second place, in these secret hearings Judge Chandler gave advice and made judicial directions and

determinations. See, for example, transcripts: January 20, Vol. I, pp. 12, 13, 55, 114-5, 140, 147; Vol. II, p. 54; January 25, pp. 53, 63-5, 76; January 29, p. 64; January 30, pp. 44-5, 46-8; February 2, pp. 48-9, 65, 84, 135, 189, 190, 198. See also Court of Appeals Hearing, March 13, Tr. pp. 69-71.

For example, the transcript records that at the hearing on January 20, Judge Chandler, invariably quoted as "The Court," said to those present (Vol. II, p. 20):

> "The Court: I'm going to make another statement, and I make it as—in my official capacity as a judge."

Again (Vol. II, p. 6):

> "The Court: • • • I'm speaking, it's going in the record."

In the third place these transcripts teem with invidious and indecent references to and prejudgments of Occidental and Hammer its president,—all uttered without any judicial substantiation or due process of law at the time or since. The following are some examples.

On January 25 Judge Chandler, speaking to Barnholt, President of Western Oil Field, Inc., concerning Hammer, said (T. 1/25/62, 72-3):

> "The Court: • • • I don't know whether we are smart enough to pull it out or not. • • • You have been terribly mistreated. It's the damnest (sic) thing. There is something about it when I see a sonofabitch undertake to—just 'cause the other man is good—I just don't see how they can do it."

Similarly on January 20 (T. 1/20/62, Vol. II, 25):

> "The Court: * * * He's (Hayutin's) not trying to protect you against Hammer and take a chance on failing to get the money from Hammer. I don't know what his relationship is, but he is so close to him and he knows him so well that he knows he'd do anything that they call good business practice, but I call it just stealing.
>
> Mr. Barnholt: Uh-huh.
>
> The Court: They would just as soon rob your company and take it over as—
>
> Mr. Barnholt: There is no question about it."

And again on January 20, referring to Hammer (T. 1/20/62, Vol. II, 17):

> "He's a wolf, and I wouldn't want even to take his money."

And still again on January 20 (T. 1/20/62, Vol. II, 41):

> "I'm not trying to be smart or tough or anything, but I've still got in my craw a man who would walk into Federal Court to buy stock rights and Mr. Hammer did * * *."

At the first hearing on February 2, 1962, the Judge referred to the persons against whom the trustee is said to have claims, including Dr. Hammer, as "these vultures" (T. 2/2/62, Vol. I, 176). At page 169 of the same transcript he declared: "They are absolute pirates." At page 195 he referred to them as "these shady characters." He called them "fast workers" (T. 2/2/62, Vol. I, 206), and cast every sort of aspersion on them: "* * * where you get in a position to have to deal with them, you need a bodyguard and a lawyer and everything else" (T. 2/2/62, Vol. I, 206). At the hearing of January 20, 1962, he also

declared: "• • • he [Hayutin] knows that Mr. Hammer would rob you if he could" (T. 1/20/62, Vol. II, 37; Vol. I, 168). Hammer has "done it (Parker Petroleum Co.) a million dollars worth of damage" (T. 1/20/62, Vol. II, 14). "He tried to take Parker over and ruined it" (T. 1/29/62, 54). At the hearing of January 29, 1962, Judge Chandler called Hammer "a thief" and said of him and Occidental: "they have defrauded the Court" (T. 1/29/62, 82); and again on February 2, pp. 155, 160.

(2) Judge Chandler's intransigent and resentful attitude toward the decision of the Court of Appeals in *Occidental v. Walker*, 289 F. 2d 1, which had reversed him, is again illustrated in the following passage (T. 1/29/62, 14-15):

> "The Court: • • • they [Occidental] considered themselves the largest stockholder • • • they'd use you for a little while and then kick you out • • • it's a fairy story to think that they would undertake to do this in this Court, but they got by with it and didn't get in the penitentiary downstairs in the Occidental case, • • • if I'd known what I know about this case now the first time I went on the bench when they reneged on the contract I'd just have ordered Mr. Hammer and said, 'You either come here to my Court or I'll send a marshal after you and bring you here in chains, and you be here. • • • from the outset he never meant to go through • • •."

(3) The transcripts also showed not only the Judge's awareness that, if the record of these secret in-chambers doings became public, his disqualification would be apparent, but also his confidence that disclosure could be prevented.

Thus at the conclusion of the very first of these hearings, held in chambers on January 20, 1962, Judge Chandler concluded the proceedings with the following remark (T. 1/20/62, Vol. I, 197):

> "The Court: • • • we certainly owed Mr. Fellers (Occidental's then attorney) no obligation whatever. He thinks that because I don't like Dr. Hammer that I don't like him. Mr. Hammer will likely sue me for slander."

Also on January 20, 1962, he discussed the prospect of putting Hayutin on the stand (T. 1/20/62, Vol. II, 18):

> "The Court: • • • I'd like to hear it myself. If he gets on the witness stand, I'm going to be sitting there. I'll let the Special Master advise me. What do you say, Paul?
>
> Mr. Duncan: I say he'll get a good examination.
>
> The Court: He's not—Bert (Barefoot) is not going to let him take the witness stand with me sitting as the judge. I don't think • • •."

Another passage at the close of the January 20 hearings is equally revealing. It occurred to Mr. Barnholt that his then attorney (Mr. Bert Barefoot) may ask him if he had been talking to Judge Chandler. He asked the Judge for instructions should that question be put to him. The Judge advised a lack of candor tantamount to a lie (T. 1/20/62, Vol. II, 54-55):

> "Mr. Barnholt: Bert is going to call, • • •
>
> The Court: Do you think he'll ask you if you talked?
>
> Mr. Barnholt: I don't know, but that has occurred to me, and I want to just set it out. If that

is your wish, I can avoid the question, I am sure. I think I can avoid it without answering it.

The Court: You can say, 'I've been seriously considering it.'

Mr. Barnholt: Uh huh. I can figure out someing to say. I wanted to set that out for you to consider, too.

The Court: I wouldn't—I wouldn't be embarrassed if he caught me at it. If you led him to believe that you haven't and he should—you don't need to be embarrassed if he caught you at it.

Mr. Barnholt: The main thing is to keep the element of doubt there?

The Court: Yes, sir."

(4) Also at the Court of Appeals' hearing on April 10 the Court accepted "for the record" a letter from Judge Chandler, dated March 12, and addressed not to the Court or even to his own attorney (Mr. Irvine) but to Mr. Earl A. Brown, counsel "for the Common Stockholders of Parker Petroleum Co." The letter was offered by Mr. Brown (April 10, Tr. 14-18).

Occidental's counsel objected that it was not probative of anything because "not even in affidavit form", "self-serving" and not affording a "chance for cross-examination". "There is no reason apparent that the witness couldn't be here" (Tr. 14, 18).

This letter to Mr. Brown contained no denial of the secret in-chambers proceedings or of the accuracy of Ingram's transcripts. It did not even address itself to Occidental's petition then before the Court of Appeals. It contained no expression of intent or desire to appear before the Court of Appeals.

As to Ingram's testimony on March 12, this second indirect communication by Judge Chandler was as evasive and artificial as the one which he had presented to the Court of Appeals on March 13, (Point VI, *supra*). As to Ingram it said that "for some reason Ingram was hysterical", and that "his testimony contains several misstatements." Specification was significantly avoided and evaded.

The Court commented (Tr. 18):

> "We might say, at the same time, that we fail to see any relevance in it, with the exception, of course, of his statement about his experience with his court reporter."

(5) The hearing on April 10 closed with a statement by the Court, from which no one dissented, that the case had been fully argued and briefed, and that there will be "a decision very soon" (Tr. 164).

Amazingly the instant petition for certiorari, although noting the hearing on April 10, mentions none of the above revelations and events on that day.

VIII

The hearing by the Court of Appeals on April 20

(1) After the hearing on April 10 closed as aforesaid, Judge Chandler sent a telegram dated April 12 (Thursday) to each of the three sitting members of the Court of Appeals which opened: "Respondent requests hearing *en banc* because of importance of principles involved • • • (and) that further delay be avoided" (Court of Appeals Hearing, April 20, Tr. 3, 4). The telegram then had the presumption

to recommend the following decision by the Court of Appeals (Tr. 4):

> "Respondent suggests that if the Court of Appeals approves, pending final disposition of Occidental application to disqualify, he will invite all of his associates on this Court (that meaning his Court) to sit en banc with him to hear all other matters than those involving Occidental, which he has already stated will be assigned to another member of the Court for hearing."

The telegram did not indicate any desire or intention by Judge Chandler to appear in person. It did not mention Ingram or his testimony.

Upon receipt of Judge Chandler's telegram, and because of his request that "further delay be avoided", "the Court conferred immediately", and its clerk sent a notice dated April 16 (Monday) to all the parties that there would be a further—the fourth—hearing on Friday April 20 before the Court, this time sitting *en banc*. The day was Good Friday, but that was the earliest date on which all the judges of this huge circuit could assemble. The clerk also sent the following letter to Judge Chandler (April 20, Tr. 4, 5):

> "Dear Judge Chandler:
>
> There will be a meeting of the Judicial Council of this Circuit on Friday, April the 20th, 1962, at Denver, Colorado, at 9:30 a.m. or as soon thereafter as the Council may convene, to consider the question of the qualification of Chief Judge Chandler to hear and determine all matters in Bankruptcy Case No. 10807, Western District of Oklahoma, entitled, 'In the Matter of Parker Petroleum Co., Inc.,' at which time you may appear and be heard."

On the same date and also by direction of the Court, its clerk sent the following further letter (April 20 Tr. 5, 6):

> "Dear Judge Chandler:
>
> Reference is made to my letter to you written earlier today and notifying you of the meeting of the Judicial Council of the Tenth Circuit to be held in Denver on Friday, April the 20th. I am requested to advise you that it is the wish of the Council that you be present at such Council meeting if you can conveniently do so."

(2) The hearing on April 20 opened with notation by the Court of Appeals that, in compliance with Judge Chandler's aforesaid request, the Court was sitting *en banc* with five judges "for the purpose of hearing any matter that any party, any interested party, wishes to present" (Tr. 6).

Although Irvine was present, Phil E. Daugherty of Oklahoma City stated that he was then speaking for Judge Chandler; that the Judge had intended to present himself; but that at the last moment the Judge found himself occupied with another matter (of the nature of which Daugherty professed complete ignorance), but "would appear at any other time if the Council desired him to". Chief Judge Murrah observed (Tr. 32-3):

> "We certainly have urged Judge Chandler to be here in every way that we know how."

All counsel (including Judge Chandler's) thereupon agreed that the case be forthwith argued and submitted on the record "as it has already been produced and transcribed" (Tr. 9-11).

Daugherty then disclaimed making any argument on the merits. He gave the excuse that he had read the rec-

ord "hurriedly" only and "I don't know as much about it as the other lawyers" (Tr. 28). Irvine was equally unvocal.

Judge Murrah commented that neither he nor his associate judges knew of any authority for Judge Chandler to sit "*en banc*" with other district judges, as he proposed in his aforesaid telegram of April 12 to the Court (Tr. 37).

(3) At the close the Court stated, without dissent from anyone, that it regarded "this matter as finally submitted for decision" (Tr. 45).

The instant petition for certiorari, although noting the hearing and orders on April 20, mentions none of the above events of that day.

IX

Summary of Judge Chandler's disqualifying acts of gross judicial misconduct

Thus the proof at the four hearings by the Court of Appeals established without contradiction the following overt acts of misconduct by Judge Chandler scandalizing the administration of justice and inescapably compelling his disqualification and replacement as an emergency in the due administration of justice:

(1) In violation of due process of law and in violation of Canon 17 of the Canons of Judicial Ethics, judicial proceedings by Judge Chandler in chambers, adverse and prejudicial to Occidental's interests, done without notice to it, and with direction by him to secrete from it.

(2) In violation of 28 U. S. C. §753(b) and (c), refusals by Judge Chandler to permit the official court stenographer to transcribe and file his official recordings of the matters which transpired in chambers, and to furnish transcriptions thereof to Occidental pursuant to its requests and offers to pay.

(3) In violation of 18 U. S. C. §§1503, 1509, of Rule 45(f) of the Rules of Civil Procedure, and of judicial duty, efforts by Judge Chandler to dissuade and prevent the official stenographer from complying with the subpoena of the Court of Appeals to produce before it his official notes (then in his possession) of what had transpired in chambers on January 20, 25, 29 and 30 and February 2.

(4) In violation of 18 U. S. C. §§1503, 1509 and of judicial duty, efforts by Judge Chandler to intimidate the official stenographer into parting with his notebooks *after* such subpoena.

(5) In violation of 18 U. S. C. §§1503, 1509, and of judicial duty, seizure by Judge Chandler by verbal order of the stenographer's notebooks *after* such subpoena.

(6) In violation of 18 U. S. C. §§1503, 1509, efforts by Judge Chandler, *after* such subpoena, to pressure and intimidate the official stenographer into swearing falsely before the Court of Appeals.

(7) In violation of judicial duty and propriety and of Canons 3, 4, 5, 17, 34 and 36 of the Canons of Judicial Ethics, repeated overt declarations and acts by Judge Chandler of hostility, enmity and prejudgment against Oc-

cidental and its president, Armand Hammer, accompanied with threats, advice to sue them, and forecasts of extravagant adverse determinations and procedures.

(8) In violation of judicial duty and propriety and of the foregoing Canons of Judicial Ethics, characterizations by Judge Chandler of Occidental and of Hammer its president made in vituperative, profane, indecent and slanderous langauge.

X

The so-called "reasons" advanced for granting certiorari (pp. 6-8) rest on predicates foreign to the factual actualities of the case and to the emergency confronting the due administration of justice.

(1) The actual case and the findings by the Court of Appeals are not mere mental "bias," but overt acts of such gross misconduct and judicial improprieties as to scandalize the administration of justice and to make immediate intervention by the appellate court essential for protection of the fair and due process of law and the dignity of the courts.

Temporizing was neither possible nor conceivable.

With judicial restraint in its language, the Court of Appeals so declared in its *per curiam* opinion (24a-26a).

(2) The decisions cited in the petition for certiorari bear not the slightest resemblance in point of fact or law to the hard and urgent actualities of the instant case.

Their citation derives from substituting an imaginary case for the real.

(3) The attempt to whittle a procedural peg is far too feigned.

Scandal in the administration of justice cannot brook frustrating delays and quillets in the exercise of appellate supervisory and remedial duties and powers both statutory and inherent.

(4) Furthermore, in the instant case, while avoiding compliance with the Court's requests for his personal appearance, Judge Chandler fully participated by counsel throughout all four hearings, and wound up by personally requesting that the Court sit *en banc*; that "further delay be avoided"; and even that the Court mold its decision to his own suggestion (Hearing, April 20, Tr. 3, 4).

Conclusion

The petition should be denied, with costs.

Respectfully submitted,

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CHARLES H. TUTTLE,
BERT BAREFOOT, JR.,
HOWARD W. REA,
THORNTON C. LAND,
Of Counsel.

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In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962

No. 563

HONORABLE STEPHEN S. CHANDLER, United States District Judge for the Western District of Oklahoma,
Petitioner,

VERSUS

OCCIDENTAL PETROLEUM CORPORATION,
Respondent.

MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE

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Duncan, Oklahoma;
JOHN S. BOTTOMLY,
Boston, Masachusetts,

January, 1963.

UTTERBACK TYPESETTING CO., 13 SO. WALKER, OKLAHOMA CITY, PH. CE 5-8750

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MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE

Earl A. Brown, in his own behalf and in behalf of Herbert F. Hewitt, Delmer L. Stagner, Gene M. Gardner and John S. Bottomly, earnestly prays leave of Court to file herein the accompanying brief and represents to the Court as reason therefor the extreme importance to all interested in the proper functioning of the Judiciary of the points involved herein.

Movant further represents that the lateness of this request has been occasioned by the fact that the urgent necessity for the filing thereof was not apparent until a copy of Brief in Opposition to Petition for Certiorari first came into his possession a few days ago.

Wherefore, Movant respectfully prays leave to file same.

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Of Counsel:

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Respondent.

RESPONDENT'S OBJECTIONS TO THE *"AMICI"* APPLICATION

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OCCIDENTAL PETROLEUM CORPORATION,
Respondent.

RESPONDENT'S OBJECTIONS TO THE *"AMICI"* APPLICATION

I

The application violates Rule 42 in all respects, including timing.

On April 20, 1962, the five lawyers who now (January 18, 1963) seek status as *amici* were all present (Bottomly being represented by Hewitt) and participated in the proceedings before the Court of Appeals, convened *en banc* at Judge Chandler's request (Tr. 2). They knew its decision and order made that very day. No one of them ever petitioned for certiorari.

Mr. Earl A. Brown, who now, nine months later, speaks for the group, was present at the Court of Appeals hearing on March 12-13 when Judge Chandler's counsel expressly conceded that that Court had the "supervisory powers" being exercised. Neither Mr. Brown nor anyone else dissented. (Tr. 159; our brief, pp. 11, 12.)

Judge Chandler's petition for certiorari was filed October 29, 1962. These lawyers do not and could not claim ignorance of it. The respondent's answering brief was filed December 18, 1962.

Not until January 24, 1963—*namely, eighty-seven days* after the filing of Judge Chandler's petition for certiorari —did respondent's counsel receive by mail from these lawyers notice of this motion and proposed brief. Their proof of service filed with the Clerk of this Court recites January 23 as the date of mailing.

Neither their notice nor their brief acknowledges that on January 18, 1963, respondent's counsel had refused a consent requested by telephone. (See our letter of that day to the Clerk of this Court; and the reasons assigned in II, *post*.)

Obviously the application violates Rule 42 in all respects. It was grossly not "timely presented". It does not disclose that consent was refused. It voices no reason to believe that the case had not been adequately presented in Judge Chandler's own brief months previously. Its substance and argument are mere repetitions of that brief. Many of the same authorities reappear. It exceeds five pages in length.

If Judge Chandler or his distinguished counsel in Washington and Oklahoma had become conscious of any inadequacy in his brief, they had had ample opportunity to supplement by a reply.

In short, this application is a much belated second afterthought for delay. The first was Judge Chandler's belated motion of January 3, 1963, to strike the respondent's brief filed sixteen days previously.

II

Respondent's reasons for refusing consent and for its present objection are, in addition to the foregoing, that the proposed brief makes no genuine contribution to the case.

Its predicates completely misstate and contradict the uncontroverted facts, the record and the findings of the Court of Appeals.

Whereas Judge Chandler's brief disregarded the uncontroverted facts and the record, the proposed brief misstates and contradicts them.

(1) The brief begins with this untrue predicate (p. 3):

> "There is no question here of an 'incapacitated' judge *or one so 'personally prejudiced' against Occidental as to be an ineffective jurist.*" (Italics ours.)

The words italicized flatly contradict the explicit uncontroverted record and the findings of the Court of Appeals.

The record teems with expressions of personal prejudice against Occidental and its president which, so far as we can discover, exceed in indecency, spite and defamation any instance of "prejudice", personal or otherwise, condemned by an appellate court. (Our brief, pp. 7-8, 14, 18-22.)

(2) Also flatly contradictory of the record is the further predicate (p. 4):

> "It should also be *emphasized* that *nothing irregular* was revealed in any of the transcripts, which conferences were all reported at the request of the judge." (Italics in the brief.)

The direct opposite are the facts. See the explicit and uncontroverted findings of irregularities made by the Court of Appeals. The secret in-chamber proceedings and all that transpired therein were *irregularities.*

Judge Chandler did not "request" the transcripts. On the contrary, he directed that transcriptions should not be delivered to Occidental; and he seized the stenotypes from the official reporter so that they could not be transcribed or produced by him pursuant to subpoena. (Our brief, pp. 12-14.)

In the April 10, 1962, hearing in the Court of Appeals, Mr. Irvine, counsel for Judge Chandler, conceded that what "was under discussion" in these in-chamber proceedings "went to the very heart of the plan of reorganization", and "affected the rights not only of Occidental, but every creditor and every other person concerned" (Tr. 55).

(3) A third predicate, flatly contradicted by the record, is the assertion that the respondent is making false, "scurrilous and scandalous" charges against Judge Chandler (p. 7).

Wherein? The only "scurrilous and scandalous" charges were by Judge Chandler himself; and the only efforts to withhold their disclosure by intimidating the official stenographer were by him. (Our brief, pp. 12-22.)

Occidental has merely presented correctly Judge Chandler's own uncontroverted words and conduct.

To quote the Court of Appeals (Hearing, April 10, p. 64):

> "The Court (Chief Judge Murrah): Well, the record here is that the Court exercised whatever control he did have over his reporter to prevent him from bringing them (the subpoenaed stenotype recordings) here.
>
> Mr. Crowe (counsel for Judge Chandler): Now, Mr. Chief Judge, I can tell you, as I said in the beginning, I regret that it happened; I really do, Your Honor, and I don't think it right."

(4) A fourth predicate, flatly contradicted by the record, is the assertion on page 3 of a

> "later expression of the Court and/or council, stating that the Writ 'does not cast any reflection upon your integrity or your devotion and dedication to the duties of a Federal Judge."

There never was such a statement by the Court of Appeals or the Judicial Council. Significantly, no page of the record is cited.

On the contrary, following the decision of April 20, 1962, the Court of Appeals, still sitting *en banc*, *unanimously* denied on June 1, 1962, Judge Chandler's petition "for a rehearing" (R. p. 21); denied on June 6 "the petition for rehearing of John S. Bottomly and C. J. Hoffman" (R. p. 23); denied on June 13, Judge Chandler's "second petition for rehearing" (R. pp. 24, 25); denied on June 13 a motion by Earl A. Brown "for stay of execution" (R. p. 25); denied on June 13, "a document filed by V. P. Crowe, attorney for respondent (Judge Chandler) requesting the

court to reconsider respondent's petition for rehearing" (R. p. 25); and denied on June 25, Judge Chandler's motion "for specific findings of fact and conclusions of law" (R. p. 27).

(5) A fifth predicate flatly contradicted by the record is this (p. 5):

> "The original Petition for Disqualification having been *abandoned* by the fiilng of the 'Amended Application', the said Amended Petition was not adequate to confer jurisdiction on the Court of Appeals to grant the Petition." (Italics ours.)

So far from being "abandoned", the "original petition" remained an acknowledged and accepted part of the record before the Court of Appeals. To quote that Court (24a):

> "We have heard the matter on the petition, the amended petition, the response, the evidence adduced at three days of hearing, the briefs, and the oral argument."

The so-called amended petition was itself entitled "petition for leave to amend and supplement petition for writ of mandamus and/or prohibition". It also asked "leave to renew and enlarge the prayer for relief set forth" in the original petition (R. p. 5).

(6) On page 4 the proposed brief claims that, at the close of the Court of Appeals hearing on April 10, Mr. Windle, counsel for the Securities and Exchange Commission, spoke against disqualification.

Candor, we submit, would have required an acknowledgment that Mr. Windle confessed that, except for the

in-chamber progeedings on January 30, he and the Commission "were not advised of these (in-chamber) meetings", and "didn't know about them" (Tr. pp. 78, 87).

Candor would also have been fulfilled by acknowledging the following (Hearing, April 10, p. 75):

> "The Court (Judge Breitenstein): Does the S.E.C. approve his (Judge Chandler's) action of withholding transcripts from the Court?
>
> Mr. Windle: No, your Honor, I do not; the Securities and Exchange Commission does not. I think that that was inexcusable."

(7) Also on page 4 the proposed brief slurs Occidental as a stockholder.

The true and full facts were stated by the Court of Appeals in *Occidental* v. *Walker*, 289 F. 2d 1 (Feb. 7, 1961).

Respectfully submitted,

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v.

OCCIDENTAL PETROLEUM CORPORATION, *Respondent*

PETITION FOR REHEARING

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PETITION FOR REHEARING

ARGUMENT

By a vote among seven justices the petition for certiorari filed in this case was denied on February 18, 1963. Chief Justice Warren stayed issuance of the order of denial on February 21, pending the timely filing of a petition for rehearing.

This petition for rehearing is rooted in the premise that highly significant issues of law and policy were either decided or blinked in the decision of the Court of Appeals for the 10th Circuit, and that the extremely

broad ramifications thereof somehow have not yet been framed with ideal clarity for this Court's appraisal.

Our petition for certiorari focussed mainly upon the serious legal questions of whether the Circuit Court, being a court of statutory and limited jurisdiction, had power to conduct a trial *de novo;* and whether, in reviewing a trial judge's rejection of an affidavit of personal bias found under 28 U.S.C. § 144, the sole question before the court is the "legal sufficiency" of the affidavit, as is unquestionably true of the trial courts themselves, *Berger* v. *U. S.*, 255 U.S. 22, and as seems to be the practice of most courts of appeal, *e.g.*, *Green* v. *Murphy*, 250 F. 2d 591, 593 (1st Cir. 1958); *cf.* also *Albert* v. *U. S. Dist. Court for Western Dist. of Mich.*, 283 F. 2d 61 (6th Cir. 1960); *United States* v. *Onan*, 190 F. 2d 1 (8th Cir. 1951); *Tucker* v. *Kerner*, 186 F. 2d 79 (7th Cir. 1950); *Eisler* v. *U. S.*, 170 F. 2d 273 (D.C. Cir. 1948).

Respondent's brief in opposition did not take a position on either of the above or any other questions of law raised in the petition. Instead, Respondent emphasized the factual transactions which it felt justified Judge Chandler's recusation. It catalogued the actual statements and actions of the Judge which, in Respondent's view, implied personal bias or hostility toward the party seeking his disqualification. Secondly, it argued that the "judicial misconduct" in this case was so heinous and reprehensible as to warrant the 10th Circuits's expulsion of Judge Chandler from the case on the strength of the appellate court's inherent supervisory powers over trial courts.

The petition and the brief in opposition do not controvert each other. They simply talk about different

things. Petitioner was not, and is not now, particularly concerned with whether the allegations in the affidavit did in fact logically imply personal bias on the Judge's part, or whether these plus all the additional transcript excerpts cited in Respondent's brief suggest such bias. Petitioner's concern is with such legal questions as whether a court of appeals may review by trial *de novo* a trial judge's refusal to disqualify himself pursuant to a 28 U.S.C. § 144 affidavit of bias; whether in such a review the sole question before the court is the legal sufficiency of the affidavit; and, if so, what are the legal standards by which this "sufficiency" is determined. The decision of the 10th Circuit ordering Judge Chandler's disqualification could well be vacated as a nullity because it lacked jurisdiction to conduct a trial or because it failed to address itself to the central question of the affidavit's legal sufficiency, and yet this would have nothing whatever to do with the factual question of bias. Upon reconsideration, the 10th Circuit might still conclude in favor of Judge Chandler's removal, on the ground that the affidavit was indeed legally sufficient. The difference, however, between that possible result and the outstanding order is that the former would, by hypothesis, be decided according to proper legal standards while the decision already rendered was most assuredly not arrived at by valid legal means. Though the end result might be identical, the difference between the two cases is far from academic. The difference is so significant, in fact, as to merit this Court's attention by way of review on certiorari, for at least two distinct reasons elaborated below.

First, let us understand why the outstanding opinion was legally defective. Viewing the case as a review by

original mandamus proceeding of the trial judge's rejection of an affidavit and refusal to recuse himself, there is virtually undeniable error in the 10th Circuit's refusal to decide the "legal sufficiency" of the affidavit. It did not even consider the affidavit, but instead elected to conduct a new trial of its own. In *Berger* v. *U. S.*, *supra,* this Court gave 28 U.S.C. § 144 the only definitive construction it has received. It held that when confronted with an affidavit of bias the presiding trial judge must decide whether its factual allegations, assumed to be true, are "sufficient" to compel his disqualification, *i.e.*, whether they imply personal bias against the affiant. He must not inquire into the accuracy of the factual allegations at all, but simply determine whether they ". . . show the objectionable inclination or disposition of the judge . . . ." If so, he has a duty to recuse himself. If this is the ambit of the trial judge's inquiry, it follows *a fortiori* that the same limitation to "legal sufficiency" applies to an appellate court's review—at least where, as here, the review was *solely* concerned with the rightness or wrongness of the trial judge's rejection of the affidavit and refusal to disqualify himself.

This analysis demonstrates error in the 10th Circuit's decision. Error alone, of course, does not necessarily afford sufficient grounds for a writ of certiorari. Why then should this Court review and correct the errors in this particular case? Petitioner suggested that there are two reasons. The first is predicated upon the error just demonstrated. If the 10th Circuit erred in conducting its own trial and making findings of fact that Judge Chandler had improperly conducted closed meetings, evinced personal bias against a litigant and that "[t]he proper administra-

tion of justice requires" his expulsion from the whole case, such putative "facts" should be erased from the record for the sake of posterity. The deleterious effects of such "findings," both as to the professional standing of the Judge and to the business of his District, are quite self-evident. The end result for the affiant here may be the same. The Judge may still be disqualified. But petitioner submits that in the interest of fairness this result should be achieved by legal rather than extra-legal means. The 10th Circuit should be required to review the legal sufficiency of the affidavit alone. If it properly concludes that it was sufficient, the Judge's refusal to recuse himself may properly be reversed. The result then would be the same as now, but with this signal distinction: it would then have been achieved on the strength of legally sufficient *allegations* whereas now it will, unless this Court intervenes, rest upon findings of *fact*—which the 10th Circuit evidently lacked authority to make.

A second reason for reviewing this case is that it clearly frames a highly significant issue of judicial policy, namely, the extent to which federal courts of appeal may or should exert "supervisory" powers over the administration of justice in federal trial courts. Indeed, in a broad sense, this is the transcendent issue of this entire matter. The basic policy question has troubled the courts before. In reviewing a petition based upon the "general supervisory powers of the Courts of Appeal over the judges of the District Courts . . .," Judge Magruder, speaking for the First Circuit, has recently observed:

> "Contrary to the view which seems to have been occasionally taken, or at least *sub silento* assumed, in other courts of appeals, we do not think that 28

> U.S.C. § 1651 [the All Writs Act] grants us general roving commission to supervise the administration of justice in the federal district courts within our circuit . . . ." *In re MacNeil Bros. Co.*, 259 F. 2d 386, 287.

With this one can readily contrast the pronouncement of Chief Judge Murrah, made and assented to by other judges in the instant case:

> We are not just sitting here to decide the legal sufficiency of an affidavit to disqualify a trial judge. We are sitting here in the exercise of our supervisory powers as a court . . . ." (Respondent's Brief, p. 11)

Related to this overall problem of judicial policy is the subsidiary question of whether the courts of appeal, as the 10th Circuit suggests in its opinion, possess "inherent powers . . . 'to effectuate what seems (sic) . . . to be the manifest ends of justice,' " where that "inherent power" focuses upon the conduct of a trial court. Petitioner simply cannot accept the literal import of the 10th Circuit's words. Certainly they are at odds with earlier utterances of the Supreme Court, *e.g.*, *Whitney* v. *Dick*, 202 U.S. 132, 137 ("It will be borne in mind that the circuit court of appeals, which is a court created by statute . . . is not in terms endowed with any original jurisdiction. It is only a court of appeal."); *Ex parte Bollman*, 4 Cranch 75, 93 (" . . . [C]ourts which originate in the common law possess a jurisdiction which must be regulated by their common law . . . but courts which are created by written law, and whose jurisdiction is defined by written law, cannot transcend that jurisdiction."); *Kentucky* v. *Powers*, 201 U.S. 1, 24 ("We say . . . the subordinate judicial tribunals of the United States can exercise

only such jurisdiction, civil and criminal, as may be authorized by acts of Congress.")

However this may be, the 10th Circuit has surely purported to act in a supervisory capacity, whether the jurisdiction to do so be bottomed upon the All-Writs Acts or its assertedly "inherent" power. A serious and recurrent problem of judicial policy is thereby clearly raised and ripe for adjudication by this Court. The problem is raised more starkly and graphically than perhaps in any other vehicle for decision tendered to this Court in a long time. If the courts of appeal possess such supervisory powers, this is surely the time for the Supreme Court to announce this proposition and, perhaps more important, to set out clear standards for the application of such powers. If they do not, Petitioner submits, this is all the more reason to vacate the 10th Circuit's order, expunge its putative findings of fact, and compel it to decide anew in a narrower compass and according to the legal standards hitherto understood to prevail as to review of a trial judge's refusal to recuse himself.

Respectfully submitted,

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In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962

No. 563

HONORABLE STEPHEN S. CHANDLER, United States District Judge for the Western District of Oklahoma,
Petitioner,

v.

OCCIDENTAL PETROLEUM CORPORATION,
Respondent.

APPENDIX to

PETITION FOR REHEARING

UTTERBACK TYPESETTING CO., 12 So. Walker, Oklahoma City, Ph. CE 5-6710

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STATEMENT OF JUDGE CHANDLER

It is the view of Judge Chandler that the important aspects of this case which go to the vital point that the Court of Appeals, having no jurisdiction whatever, found him guilty of acts which Respondent charges in its Brief in Opposition to Petition for Certiorari (pages 26 and 27) constituted "overt acts of misconduct * * * scandalizing the administration of justice"; "violation of Canons 3, 4, 5, 17, 34 and 36 of the Canons of Judicial Ethics"; violation of 28 U.S.C., Sec. 753(b) and (c); and violation of 18 U.S.C., Secs. 1503 and 1509, each constituting a felony and, if true, subjecting him to fines and imprisonment, in violation of

his sacred constitutional rights, have been completely overlooked by the Court.

Respondent, Occidental, instead of answering the important questions of jurisdiction presented by Petitioner has chosen to continue its personal vilification, violating Rule 40(5), by quoting, out of context, a few words from a very voluminous record, thus giving a completely false and distorted impression of the facts. The words quoted are entirely foreign to any issue involved, impossible of understanding except to one *thoroughly familiar with the entire record* in the *Parker* case covering several years and consisting of many volumes and thousands of pages. This highly unethical procedure, successful to date, undoubtedly has been followed by Respondent because there is no valid answer to the jurisdictional question and for the purpose of obtaining wide press coverage of the personal vilification in an attempt to destroy Petitioner's usefulness as a judge, to *confuse* and *prejudice* the Court, and thus to *obscure* the *broad extremely important vital issues* involved as it was successful in doing in the Court of Appeals.

Judge Chandler has not indulged in personalities. He has carefully refrained in the Court of Appeals and here, out of reverence for the sacred traditions and ethics of the Bar and Judiciary, from doing so. He has based his Petition upon the high grounds,

FIRST: that the Court of Appeals and Council acted without any vestige of jurisdiction, in entering the *absolutely unprecedented* and *unconstitutional* orders and judgments which are here for review and,

SECOND: that the judgments violated the statutory rights of the parties to the action, *his fundamental constitutional rights*, and the most sacred principles of our democratic form of government.

The continued repetition and reiteration by Respondent of the scurrilous matter in its Objection to Second Application of Amici Curiae, *purely personal in nature*, is inexcusable and makes it imperative that Petitioner rise to his own defense in an attempt to prevent future persecution of other judges who may find themselves in the same position if the precedent set by the judgment here involved is allowed to stand.

It now appears that unless the true pertinent facts are disclosed, the grave and un-American injustice to him as a Judge and citizen, toppling from its foundation the very cornerstone of our Judicial system, will not be brought to light and will be forever buried. This may be his last opportunity to bring them to the attention of this Court. They are necessary to an understanding of the transcendent importance of the questions involved.

Traditionally, controversies between judges are not publicly aired. This explains Judge Chandler's reticence to date. However, since the matters involved are not in any sense personality clashes but involve serious and important questions of ethics and conduct of judges and lawyers and the proper spheres of activity of Circuit and District Courts in our judicial system of the highest order arising before him in the performance of his judicial duties, as a judge

and lawyer, after long and careful consideration, he has come to the conclusion that it is his official and professional duty to disclose them in this instrument.

For this reason, with regret, impersonally, and solely because he considers it his bounden duty to do so, he makes the following necessarily brief statement of facts, and conclusions drawn from evidence before him in his capacity as judge in the *Parker* case so that the Court may grasp the nature of the case brought here and the questions here for review:

Occidental Petroleum Company through Dr. Armand Hammer, Marvin Hayutin and their attorneys, Barefoot and Bohanon, had proposed a plan of reorganization of Parker Petroleum Company pending in my Court before my late associate, Judge Wallace. Thereafter and before confirmation of the plan, Occidental sold several million dollars of its securities to the public referring to the proposed Parker plan in its prospectus.

After selling the securities it did not wish to acquire Parker. However, it was aware that the Securities and Exchange Commission was taking the position that it was in violation of the Federal Securities Laws because it had not in good faith intended to acquire Parker. For that reason Occidental decided to attempt to have the plan amended to include an escape clause, have it confirmed and later abort it, hoping that the Securities and Exchange Commission could not then sustain its contention that it had not acted in good faith at the time it proposed the plan and sold the securities to the public.

Confirmation of such a plan was obtained by fraud practiced on Judge Wallace and the stockholders and creditors of Parker by means of misrepresentations made by Luther Bohanon and Bert Barefoot, attorneys hired for that specific purpose by Dr. Hammer. Shortly after the plan was confirmed Occidental gave notice under the escape clause that it would not consummate it.

When Judge Wallace died on June 26, 1960, under the rules of our Court it became my duty to proceed in the Parker Reorganization matter, in Bankruptcy, which up until his death had been handled by him.

During subsequent proceedings I concluded from the evidence that Hayutin and Hammer, who had joined Hayutin in a second refinancing plan, proposed by Western Oil Felds, Inc., were not acting in good faith and were attempting to perpetrate another fraud upon the stockholders, creditors and the Court through Hayutin's attorney, Barefoot, and were preventing Barnholt, who was also represented by Barefoot, from reporting their dereliction and that of Barefoot, to me.

After consultation with the attorney for the trustee and the Special Master for the plan, it was determined that I had the duty to call Barnholt in to confirm or deny these facts. The *only* conference that could possibly be considered a "secret" or "closed door conference" is this one which was attended by the attorney for the trustee, the Special Master on the plan, my law clerk and my court reporter (Record, Jan. 20, 1962). The facts learned clearly confirmed the dereliction of Barefoot, Hayutin and Ham-

mer and these facts, showing clear conflict of interest between his original clients and his new client Barnholt (Western), were disclosed to Mr. Barefoot in the presence of *both* of his clients, Hayutin and Barnholt, three days later when they appeared at my request for a conference. Attendance at this conference was as before, with the addition of Barefoot and his other client, Hayutin (Record, Jan. 23-24, 1962). Transcripts of these two conferences were furnished by my order to Barefoot and were the basis of the affidavit for my disqualification filed by him for his erstwhile client, Occidental.

Barefoot, Hayutin and Hammer were, nevertheless, because of the urgent need of the funds to protect the stockholders and creditors of both Parker and Barnholt's company, Western, granted until January 30 to meet their obligation to bring in the promised $2,500,000 financing *in cash with no strings attached*, as agreed in open court when the second Western plan was approved (Record, Nov. 3, 1961). This was *not* done. Barefoot became menacing when he continued to pressure and importune me in Chambers to extend the time further. I then advised him, through the trustee's attorney, that I would not thereafter be available to him and Occidental's then attorney in Chambers but would be available for conference in open court, and would hear them from the bench at any time either of them cared to appear with the trustee, the attorney for the trustee, or other interested attorneys.

Bohanon and Barefoot had withdrawn as counsel for Occidental (application and order of August 3, 1960) after

the first hearing held by me following Judge Wallace's death on the stated ground made to me in Chambers by Bohanon that Hammer and Occidental had not acted in good faith in refusing to consummate the original plan and for that reason they would not represent them further. This reason, leading me to believe they were not parties to the fraud and disapproved of it, confirmed the full confidence I had at that time in both Bohanon and Barefoot as honorable members of the Bar and thus made it possible for Barefoot later, after Bohanon had been appointed a member of my Court, and Barefoot was continuing to represent Hayutin and Hammer, to again mislead me. The attorney of record for Occidental after Bohanon and Barefoot withdrew, did not certify that the Affidavit for Disqualification filed by Occidental was filed in good faith. It was certified to by Barefoot, who then again assumed representation of his erstwhile client, Occidental. Thereafter the interim attorney of record for Occidental filed his withdrawal.

Every fact learned in every conference held prior to January 30 [entirely proper and necessary conferences in a Bankruptcy case where the Federal Statutes give the judge additional extraordinary powers since most of his duties in Bankruptcy cases are administrative (see 11 U.S.C. Sec. 11), which specifically authorizes (Section 2) "in Chambers" conferences] was put into the record by me from the Bench in judicial language at fully noticed hearings. Barefoot, Hayutin and Occidental were informed of every fact learned, but, for Barnholt's protection, they were *not* advised of the fact that the conference with Barnholt had

been held on January 20, 1962, when we were investigating the conduct of Barefoot to determine with certainty whether he was derelict in his duty to his client, Barnholt (Western), and guilty of collusion with Hayutin and Hammer to defraud him (Western). They were, however, advised of all *facts* learned at that conference at the conference held three days later (Record, Jan. 23-24, 1962).

At the fully noticed hearing on January 30, 1962, I adjudged Hayutin and Hammer (Occidental) in default of their obligation to finance Western in the second plan, set two motions already pending against Occidental for hearing on a date certain. I also ordered a fraud suit filed against Hayutin in Federal Court in New York. Hayutin's associates in that transaction, who were represented by skillful counsel, settled for $150,000 cash before the suit was filed the following week. Mr. Kirk Windle, attorney for the Securities and Exchange Commission, stated in the fully noticed hearing of November 3, 1961, that the claims exceeded in value the figure of $1,000,000.

Hayutin's liability in the case now pending in New York is about $570,000. The case is well and conclusively documented and was ordered filed by me at the request of the Securities and Exchange Commission. Prior to authorizing the suit, well documented evidence was presented to me showing that Marvin Hayutin, associate of Dr. Hammer and self-styled "money finder," had been guilty of violation of the Securities and Exchange Act and the Internal Revenue Laws in the original sale of the Parker Securities to the public. This evidence was later confirmed

and further documented by documents obtained by me at the conference of February 2, 1962.

I had stated in the record at the January 30 court hearing and at other hearings, based on evidence before me, that no financing of the Western plan would be approved under any arrangement whereby it appeared that Hayutin and Hammer might in any manner be able to obtain control of Western because I did not have confidence in their integrity; that it was my duty to see that any reorganized company approved by me was properly financed and that it would be operated by men of ability and integrity; that no financing would be approved whereby stock was issued to Hammer or Occidental unless proper safeguards were provided to prevent their obtaining control of the reorganized company since it was apparent that Occidental coveted certain very valuable assets of Western and Parker and had attempted to perpetrate a fraud on the court to obtain them.

Thereafter Occidental, through Barefoot, who with his then partner, Luther Bohanon, had withdrawn as its attorney for the stated reason that Occidental was guilty of bad faith in failing to consummate the original plan confirmed by Judge Wallace, and now acting as attorney for Occidental against the interest of his erstwhile client, Barnholt (Western), demanded the transcripts of other conferences. This duplicity naturally caused me to doubt his right to them, or for that matter his right to act as counsel for Occidental under such circumstances.

At this point it is significant to note that if I continued to handle the case it was likely quite apparent that Ham-

mer (Occidental) could not get control of the $20,000,000 of assets involved in the plan of reorganization and that if I remained in the case, the important proceedings against Hammer and Occidental, which I had set for trial, and the fraud suit against Hayutin which I had ordered filed in Federal Court in New York, would be prosecuted with diligence.

At no time did I intend to try the matters involving Hammer, Occidental and Hayutin, for the reason that I would of necessity be an important witness in connection with those factual matters not shown by the record but coming to my knowledge during the proceedings from personal conferences with attorneys for the parties and otherwise. This is one of the reasons that I *readily* and *immediately* upon the filing of the affidavit for disqualification sent word to Barefoot by the attorney for the trustee that regardless of the merits of the affidavit, I would assign these matters to another judge of the court for trial.

It is significant that in spite of this knowledge, which it is admitted in the record was conveyed to Mr. Barefoot on Saturday, the day after the affidavit was filed, that, nevertheless, the mandamus or prohibition proceeding was filed in the Court of Appeals the *following Tuesday without conveyance of this information* to the Circuit Judge who signed the order staying proceedings. The failure to do so was a flagrant violation of legal ethics.

It is also noteworthy that although on Friday preceding the Monday set for the hearing in the Court of Appeals at Denver of the petition for mandamus or prohibition, I entered and signed a written order finding the affidavit insufficient but nevertheless stating that *the Occi-*

dental issues would be tried by another judge of the Court. When served with a copy of this order on Friday, counsel for Occidental notified the attorney for the trustee that the hearing in the Court of Appeals would proceed on the following Monday, regardless of the fact that *all relief prayed for* had already been granted by me.

At this hearing, presided over by Chief Judge Murrah, the Court of Appeals, although no prior notice was given, permitted Occidental to file an amended petition praying for my disqualification in the *entire* proceeding, notice of which has never yet been served on me. At that time and at no time prior to the entry of the judgments by the Court of Appeals and Council did I ever consider the action as a *personal one* against me and could not have reasonably anticipated that such unprecedented unconstitutional orders would be entered. At most I might be disqualified, or so I thought and believed at the time, and was advised by counsel that that could not happen because the Court was without jurisdiction.

I considered the proceeding there as one involving the rights of the parties to the action, and that it was no concern of mine except that I knew it was my duty to refuse to disqualify in the *entire* action for the reason that the motives of Hammer (Occidental) in undertaking to have me removed from the entire case were not honorable, having reached the inescapable conclusion from the evidence that they were attempting to obtain control of the $20,000,000 of assets of Parker and Western for their own aggrandizement at the expense of the stockholders of Parker and Western and that Hammer (Occidental) knew

that this could not be done as long as I remained in the case.

It is significant that the attorneys representing all interested parties, except Occidental and Hayutin, and including the Securities and Exchange Commission, expressed approval of my orders and objected to my disqualification.

It is worthy of note that neither Occidental nor Hayutin were stockholders nor creditors of Parker Petroleum Company at the time of the institution of the reorganization proceedings but *acquired their interests thereafter*, which places them in an *entirely different category* from the original and vitally interest ' stockholders and creditors. Hammer's stock was acquired for him by Hayutin in connection with the first proposed and aborted plan of reorganization. Hayutin acquired a large claim against the Company in another reorganization proceeding handled by Judge Wallace, to-wit: Indian Drilling Mud, Inc. There is on file in the Parker Proceeding (filed June 9, 1960) an attorney's lien whereby his attorneys, Barefoot and Bohanon, claim a 25 per cent interest in his $57,810.90 claim and interest and 25 per cent of any and all cash distributions and 25 per cent of all debenture distributions that may be made to him out of and from and by reason of the Parker Petroleum Co., Inc.

Every conclusion of fact drawn by me and stated herein is based upon and deduced from actual available evidence shown by the record and coming to my knowledge as judge in the case, and are the only conclusions which I could rationally draw from the evidence. I verily believe that these same conclusions would be inescapable to any disinterested, experienced judge or lawyer upon considera-

tion of the same evidence. Any bias or prejudice against Hammer (Occidental) was created by the evidence before me. I did not know them personally or by reputation prior to taking over the *Parker* case.

From the above statements it should be clear that this is not the case which Occidental has undertaken to pose before this ultimate tribunal, and it should now be apparent that this is not an ordinary case where a judge is asked to disqualify. No honest judge seeks or desires to handle *any certain litigation* and is always quick to withdraw when there is the slightest ground to believe that any party with reasonable justification wishes him to do so. It is my belief, however, that it is a judge's duty *not* to disqualify where the facts and circumstances make it apparent that the request for disqualification *is not made in good faith* but is an attempt to run him off the Bench for the purpose of obtaining another judge after the party has learned how the judge will likely decide the case from conclusions the judge has drawn from evidence coming before him in the proceedings.

It is also significant here that the attorneys for Occidental did not indulge in the usual courtesy extended by counsel to the Court by asking him whether or not he would object to having some other judge try the case. Had that courtesy been extended here, counsel would have learned before filing the affidavit of disqualification, as they did immediately afterward, that the judge had no intention of trying the matters involving Occidental and Hayutin as he considered himself a material witness in those proceedings.

The inescapable conclusion to be drawn from their failure to do so is that they wished to discredit me by

obtaining wide publicity of the out of context, seemingly scurrilous and careless language used in the informal conferences, which were quoted by them in the Affidavit of Disqualification, and thus bluff or scare me off the Bench. When they were not able to do so they were forced to pursue other means.

It was only when word was received that Chief Judge Murrah would preside at the hearing in Denver that it was decided not to send the notes. Research disclosed that the court reporter, by Statute 28, U.S.C. 753(c) was subject to the supervision of the appointing court, "including dealings with parties requesting transcripts," and it was determined that Mr. Barefoot was not entitled to obtain by subpoena *duces tecum* to the reporter, the stenographic notes or transcripts which had at all times been in my physical possession, except when some of them were delivered to the reporter for transcription and return. For that reason the reporter was *told to state that Judge Chandler said* that the notes were in his possession and had been in his actual or constructive possession at all times even when delivered to him for transcription and that if the Court of Appeals came to the conclusion that Barefoot was entitled to transcripts made from the notes, and so ordered, he would, of course, furnish them.

I am not going to overlook the *unbelievable* conclusion of the Court of Appeals that I *tried to prevent* my reporter from the performance of his official duties. *Of course, I did not.* There could not possibly have been any reason for me to do so. I did not think that Mr. Barefoot under the circumstances existing, could legally obtain them by sub-

poena to my reporter to bring them when by Federal Statute [28 U.S.C. § 753(c)] the reporter was subject to my supervision in the performance of his duties, "including dealings with parties requesting transcripts." I am still of that legal opinion.

If any error was made in not permitting him to take the notes, it was *at most* an *error of law* made by me after consultation with skillful counsel and many hours of research in order to determine my legal duty in that regard, and in this connection I might state that the question of not sending the notes never arose in my mind until I learned on Friday before the hearing in Denver on Monday that Chief Judge Murrah would preside.

In closing it seems proper to call attention to the *important fact* that *no improper conduct* on my part was *disclosed when the records of the so-called "secret" conferences were transcribed*, unless it be my carelessness in using common, ordinary, everyday descriptive terms in the informal conferences to describe Dr. Armand Hammer. The first of the seven words so often quoted by Occidental, I am reasonably certain, I did not use, but it is possible I did so.

As to all of the terms, they are in the language of the street and are quite accurately descriptive of the kind of person the evidence in the *Parker* case shows Dr. Armand Hammer to be. They may be even more accurately descriptive of him than my finding from the Bench using judicial language that *he did not possess the requisite integrity and moral character* to be trusted not to make away with the assets of Parker and Western worth millions of dollars.

QUESTIONS PRESENTED

1. Can a Court of Appeals or Judicial Council, having no jurisdiction of a Petition for Mandamus or Prohibition, during the trial of a case by a trial judge, exercise *self-assumed inherent right* to exercise naked power to control the actions of a trial judge, by disqualifying him, thus destroying his necessary judicial independence, the ordinary right of appeal being available to an aggrieved party?

2. May a Court of Appeals, totally without jurisdiction, but imbued with a sense of omnipotence, disqualify a trial judge in a case he is at that time trying, *simply because they do not like* the manner in which he is trying it?

3. May a Court of Appeals constitute itself a Judicial Council and thus *create* its own jurisdiction to do so?

4. Is there a *sustainable compatibility between* the expressed conclusion that the trial judge was conducting "closed door hearings, meetings, discussion in Chambers," etc., with its "unholy" implications, and the expressed conclusion that he "tried to prevent a court officer from the performance of his official duties," etc., wholly untrue but constituting, if true, as charged by Occidental in its Brief in Opposition to Petition for Certiorari, two felonious crimes against the United States, and the later expression of the Court and/or Council in reply to the judge's request for *specific* findings of the facts upon which such conclusions were based, that the writ "*does not cast any reflection upon your integrity or your devotion and dedication to the duties of a federal judge*"? (See Exhibit A hereto.)

5. Does such judgment of the Court of Appeals and or Council containing conclusions of fact constituting Federal crimes which are published in the Federal Reporter 2nd Series constitute a clear violation of the trial judge's constitutional rights?

6. If such a judgment becomes final by denial of certiorari, is the trial judge precluded from later proving that such conclusions are wholly contrary to the true facts?

7. Would such conclusions in the judgment of the Court of Appeals and/or Council have such probative weight as to make it virtually impossible for the trial judge to convince even unprejudiced persons that the conclusions were the result of a total lack of understanding on the part of the Judges of the Court of Appeals of the true facts involved and had been made in what virtually amounted to an *ex parte* hearing?

8. Should such judgment be permitted to stand and be published in the bound volumes of the Reporter system, strengthened and made more authentic to the average citizen and even the average lawyer by the denial of certiorari by the highest court of the land on the grounds of *expediency* or the *lack of the importance* of the great principles involved?

9. Is not such a judgment usurpation of the powers and duties of the trial court?

10. Does a Court of Appeals have the inherent power to arbitrarily designate a case, an "exceptional" one, and thereby create for itself the "power and inescapable duty

to act" * * * "*under the inherent power of a United States Court of Appeals to effectuate what seems to it to be the manifest ends of justice.*" (See 2nd paragraph of Judgment of the Court of Appeals in the instant case.)

11. Does a Court of Appeals have unlimited power to supervise trial judges?

12. Is the fact that this is a case of first impression, standing alone and that the only precedent the Court of Appeals could cite for its power to enter the order was its own, the *Ritter* case, 273 F.2d 30, from which it quotes, (see Question 10) and then states, "Application to the United States Supreme Court for relief from our action in the Ritter case was denied," indicative of an effort to bolster its authority showing the *weak* foundation upon which the decision here stands?

13. Is the Resolution of the Ninth Court of Appeals (Exhibit B) indicative of a *serious conflict of circuits* on the question of the power of a Court of Appeals to call "district judges on the carpet * * * to crack the whip over them" in order to control their actions instead of by the time-honored method of reversal with directions, to which traditional method no trial judge objects.

The foregoing facts and questions, it is hoped, will point up the folowing:

By the specific words of its decision the Court of Appeals and/or Council arrogates unto itself *the broadest possible power to control, in advance, the decisions of the trial court,* even to the extent of choosing which judge of the multiple judge trial court shall proceed further in the litigation.

The case before the Court of Appeals was not exceptional, but the decision there and here for review is such an *extremely unusual* and *unprecedented* one, that it poses the question, "HOW COULD SUCH A THING HAVE HAPPENED IN AMERICA?"

The answer to this question, it seems to me, is implicit in the facts stated and questions posed. It surely could not have happened in America. Yet it did happen and the answer to HOW could it have happened or WHY did it happen may be apparent from the above observations.

CONCLUSION

I wish to state that the irregularities involved in the Court of Appeals judgment would be easier for me to accept if it were not for the fact that Chief Judge Murrah failed to disqualify himself, and that the Court which entered the unprecedented and unconstitutional judgment against me was presided over by Chief Judge Murrah, not only as a presiding judge *but as an advocate against me*, as shown by the record of the proceedings in open court. Of his own motion he broadened the issues to include the determination of whether I was entitled to sit in the case at all, and I believe it is implicit in that statement and others made that he did not think I was entitled to sit in that case or any other case, indicating the extent of his prejudice. Although I attempted to call his disqualification to the attention of the court in open court through counsel who had identical sealed messages from me for each of the judges, and who again offered them to the Court or Coun-

cil in conference after the open hearing and before the entry of the judgment, their receipt was refused. The message stated that Judge Murrah was disqualified to sit on the Bench or in conference to exhort his colleagues to condemn me because of his long standing, strong prejudice against me and his long standing, strong prejudice in favor of his former partner, Luther Bohanon, who is his warm, long time personal friend and former law partner. I further stated that he was prejudiced in favor of Barefoot, Judge Bohanon's long time law partner.

I believe that, under these circumstances, Chief Judge Murrah had the clear obligation to disqualify as required by 28 U.S.C., Sec. 455.

I regret the necessity of bringing this case here, but I would be less than a man, and unqualified for the sacred position which I have held for approximately twenty years, if I failed, because of the unpleasantness of the duty, to do so.

In closing it should be *emphasized* that *there is now no question involved here affecting the Parker reorganization*. That case, after my disqualification, has been handled by a skillful and competent judge and in all likelihood will soon be closed.

There is involved here *only* the request of petitioner that this Court grant *certiorari* and hold that the Court of Appeals and Judicial Council were without jurisdiction or authority to enter the judgment of disqualification containing the offensive and improper conclusions of malfeasance and that such judgment and the scandalous matter

filed by Respondent in violation of Rule 40(5) be expunged from the records of this Court, the Court of Appeals and the Federal Reporter, 2nd Series.

The legal questions have been so fully and skillfully briefed by counsel and *amici curiae* as to leave no doubt that neither the Court of Appeals nor Council had jurisdiction.

To deny *certiorari* and permit this decision to stand will add verity to the conclusions finding Respondent guilty of misconduct and malfeasance. Laymen do not understand that the denial of *certiorari* does not mean that the judgment involved is approved. They think it affirms and approves it.

Petitioner seeks only the same protection of his constitutional rights that this ultimate Court so zealously extends to the humblest citizen.

I will close by respectfully stating that the parties who have charged and are vilifying me perpetrated a gross fraud on my late associate, Judge Wallace, and tried to perpetrate a gross fraud on me. They are now engaged in defaming the judge who caught them "red handed" and prevented, temporarily, the success of their fraudulent scheme. I assert, based on evidence coming to my attention in the *Parker* case, that they are active *stock manipulators* and were able to manipulate the over-the-counter market to run the stock of Parker and Western up, while obtaining extensions of time to furnish promised financing from the unsuspecting judge (at one time the stock reached

more than three times its value at the time of the confirmation of the Western plan) attempting, thus, to obtain funds to finance the plan instead of procuring it legally as promised.

Petitioner respectfully asks leave to further document this "Appendix" with documents not presently available through no fault of Petitioner.

Respectfully submitted,

STEPHEN S. CHANDLER,
United States District Judge.

EXHIBIT A

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CIRCUIT JUDGES

TOM C. CLARK
CIRCUIT JUSTICE
WASHINGTON 15, D. C.

United States Court of Appeals

TENTH CIRCUIT

Cheyenne, Wyoming
April 30, 1962

Honorable Stephen S. Chandler,
United States District Judge,
Oklahoma City, Oklahoma.

Dear Judge:

At its meeting in Wichita, Kansas on April 25, 1962, after hearing your full statement, the Judicial Council of the Tenth Circuit of the United States, concluded that no changes should be made in its disqualification order of April 20, 1962, entered in the matter of the reorganization of Parker Petroleum Co. Inc., Docket Number 10807—Bankruptcy, Pending in the Western District of Oklahoma.

The Council appreciates your feelings in the matter but is satisfied that the implications which you place upon its action are not justified. The order does not cast any reflection upon your integrity or your devotion and dedication to the duties of a Federal Judge. The Council recognizes that Judges have feelings and reactions as other human beings. Consequently, they may sometimes become so embittered and incensed, for reasons understandable to them, including what they consider misconduct of parties interested in matters pending before them, that they cannot give

[EXHIBIT A CONTINUED]

the calm and impartial consideration to the final disposition of these matters which the law demands. When these conditions exist, it is best for everyone concerned that they step aside.

Very truly yours,

(signed) John C. Pickett
John C. Pickett,
For the Council

EXHIBIT B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

February 1, 1961

TO ALL CIRCUIT AND DISTRICT JUDGES OF
THE COURTS OF THE UNITED STATES:

On November 13, 1959, the Judicial Council of the Ninth Circuit unanimously adopted a resolution opposing a draft of a proposed amendment to Section 332, Title 28, U.S.C., relating to the composition and powers of the Judicial Councils. At the same meeting the Council unanimously approved a statement of opposition to such proposed amendment.

At a meeting of the Council held on October 12, 1960, the Secretary of the Council was directed to mail copies of such statement to all the Circuit and District Judges of the Courts of the United States. Pursuant to that resolution I am forwarding the enclosed statement.

GILBERT H. JERTBERG
Secretary of the Judicial Council
of the Ninth Circuit

PROPOSED AMENDMENT OF § 332, TITLE 28, U. S. C.
RELATING TO JUDICIAL COUNCIL

Statement by Ninth Circuit Council

We think it is apparent that the proposed amendment of Title 28, §332, concerning judicial councils, is intended to be a forerunner of pressures to increase the activity of such councils. This is particularly apparent from the new language found in subdivision (6). The taking of "such action thereon as may be required to obviate congestion or delay in the disposition of judicial business" takes in a lot of territory.

[EXHIBIT B CONTINUED]

The present arrangements, through statutes, and through the processes supervised by the Judicial Conference, supply means, both useful and inoffensive, for the encouragement of judicial efficiency and dispatch. Statistical records are gathered and made available to the judges concerned, and to the judicial councils, showing the state of the business in the hands of each district judge. Conferences or seminars for judges, designed to evaluate such techniques as pre-trial conferences and improved sentencing procedures are frequently available. A properly arranged program at the circuit conferences, where attendance is compulsory, have similar advantages. In our view this process is an adequate incentive; and we are also convinced that pressures going much beyond this would do more harm than good.

If there is any one thing that distinguishes a federal judge it is his integrity and his independence. The obvious purpose of the proposed enactment (together with the implied suggestion that now judicial councils should be put to more use), is to provide means for calling district judges on the carpet. In our view nothing could be more subversive of a district judge's pride and sense of responsibility. We might as well abandon a federal judicial system if we cannot be assured, without schoolmasterish supervision, that every judge will do his level best.

Even the present system of supervision of district judges has questionable aspects. The most important accomplishments of a good judge cannot be recorded on the Administrative Office's IBM machines. Under their purely quantitative evaluations, whereby every case weighs the same as every other case, the more painstaking, careful and conscientious judge often suffers a disadvantage;—time taken by him to assure a sound decision puts him in jeopardy on his statistics. The judge who mass-produces decisions with a lick-and-a-promise system will look much better on the IBM cards.

We think the system of control of judges through administrative bodies such as the Conference and the Council has gone far enough. In our view the proposed increase in supervisory activity is most unfortunate. The inestimable benefits of a judicial system handled by trial judges who are answerable to no man, and under no control other than that of their own consciences, could well be lost by a change calculated to create the feeling on the part of the judge that he was just another employee taking orders from a judicial council acting as a quasi board of directors.

As for the present members of this judicial council, we do not propose to take any action which might be construed by the district judges as an effort to crack the whip over them. The district judges in this circuit will, we are confident, know how to adapt to their own needs, and to make use of, the facilities for judicial improvement presently available through the Judicial Conference, the Administrative Office and the circuit conferences. If, once in ten years, or thereabouts, a judge so deteriorates mentally or morally as to require certification under §372 (b) of Title 28, we shall be able to take appropriate action, whether district judges are, or are not added to the council. As for the remainder of the time, while we are not adverse to providing some district judges with quarterly trips to San Francisco, we think travel money could be put to a better use.

[EXHIBIT B CONTINUED]

UNITED STATES DISTRICT JUDGES
of
THE NINTH CIRCUIT

PRESIDENT
HON. DAVE LING
PHOENIX, ARIZONA
SECRETARY
HON. ALBERT C. WOLLENBERG
SAN FRANCISCO, CALIFORNIA

December 11, 1961

Dear Judge:

At the suggestion of Judge Dave Ling, President of the District Judges for the Ninth Circuit, I am writing to advise you of a plebiscite by secret ballot taken by Judge William J. Lindberg, the District Judge representative of the Ninth Circuit to the Judicial Conference of the United States, on whether the District Judges of this circuit approve or disapprove H.R. 6690 regarding District Court representation on Circuit Councils.

Judge Lindberg reports the result of the vote as follows:

Number of ballots mailed out to District Judges (38 active, 4 retired)	42
Number of ballots cast	41
In favor of H.R. 6690	0
Against H.R. 6690	41
In favor of H.R. 6690 with the Keating Amendment	0

Judge Ling has expressed the feeling that it may be of interest to you to know how the District Judges of this circuit feel on this issue.

We are informed that H.R. 6690 as introduced has passed the House, has been approved by the Senate Judiciary Committee, and that the bill, together with the Keating Amendment, is riding on the Senate calendar. We

are further informed that the Judicial Conference of the United States, by a divided vote, last September approved H.R. 6690. We enclose a copy of H.R. 6690 and the Keating Amendment.

Sincerely,

/s/ Albert C. Wollenberg
Secretary

Encl.

Office-Supreme Court, U.S.
FILED
APR 29 1963
JOHN F. DAVIS, CLERK

In the

Supreme Court of the United States

OCTOBER TERM 1962

No. 563

HONORABLE STEPHEN S. CHANDLER, United States District Judge for the Western District of Oklahoma,
Petitioner,

v.

OCCIDENTAL PETROLEUM CORPORATION,
Respondent.

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In the

Supreme Court of the United States

OCTOBER TERM 1962

No. 563

HONORABLE STEPHEN S. CHANDLER, United States District Judge for the Western District of Oklahoma,

Petitioner,

v.

OCCIDENTAL PETROLEUM CORPORATION,

Respondent.

BRIEF AMICI CURIAE

SUMMARY OF ARGUMENT

The issues in this proceeding arose by reason of the acts and conduct of Occidental Petroleum Corporation, its representatives and attorneys, during a reorganization proceeding pending before Judge Stephen S. Chandler, styled, In the Matter of Parker Petroleum Co., Inc., Debtor, No. 10807 in the United States District Court for the Western District of Oklahoma.

The case was one in which the debtor required outside financing in order to complete the reorganization. Occidental Petroleum Corporation filed a plan of reorganization on August 14, 1959, which was accepted by the creditors and stockholders. After many months of hearings, amendments

and changes, it was finally confirmed by the court on May 13, 1960. Then Occidental abruptly served notice, on June 10, 1960, that it was withdrawing from the plan, under an escape clause in the supplemental contract which had been entered into between Occidental and the trustee. Upon a hearing before the District Court, it was held that Occidental could not legally withdraw from the plan, but was bound to carry out its plan and discharge the obligations it had assumed. Upon appeal of the case the United States Court of Appeals for the Tenth Circuit held that Occidental, under its contract with the trustee, had the right to withdraw from the plan. *Occidental Petroleum Corp. v. Walker*, 289 F2d 1.

However, there was another issue in the case that remained undecided, and that was the liability of Occidental for damages in failing to consummate the plan. The Court of Appeals, upon motion for rehearing and clarification, left this question open. *Occidental Petroleum Corp. v. Walker*, 289 F2d 6.

Following the return of the case to the trial court for further proceedings, two motions were filed against Occidental. They were (1) a motion, filed by the trustee, to subordinate the preferred stock of Parker Petroleum Co., Inc. owned by Occidental to the claims of other preferred and common stockholders, and (2) a motion, filed by the creditor, Webster Drilling Company, to tax as costs to Occidental certain expenses of the reorganization of Parker in an amount not less than $250,000.

These motions had been pending for several months without any claim that Judge Chandler was disqualified to hear them when, on February 26, 1962, the trustee filed an application to take the depositions of certain officials and employees of Occidental, in Los Angeles and Bakersfield, California, on March 6, and March 8, 1962, respectively; and the Court had set the date of hearing on said motions for March 13, 1962. Then, late in the day on March 2, 1962, Occidental filed in the case an affidavit styled "Application for Disqualification" of Judge Chandler, which was stated to be "in accordance with Section 144, of Title 28, United States Code."

The affidavit charged personal bias and prejudice on the part of Judge Chandler and sought only his disqualification to hear the two motions set for hearing on March 13, 1962.

Thereafter, on March 6, 1962, without waiting for Judge Chandler to act on the affidavit, Occidental filed in the United States Court of Appeals for the Tenth Circuit the Petition for Writ of Mandamus and or Prohibition, and that Court issued its order directed to Respondent to show cause why such writ should not issue, and restraining the Respondent from deciding any motions or other claims against petitioner (Occidental), *and from the taking of depositions and the examination of witnesses*, a matter which was entirely unrelated to the disqualification of the Judge. The writ was made returnable on March 12, 1962.

The foregoing action was taken notwithstanding the fact that Mr. Irvine, attorney for the trustee, had advised Mr.

Barefoot, attorney for Occidental, on Saturday, March 3rd, the day after filing the affidavit and application for disqualification that Judge Chandler would not hear the motions, but would assign them to another Judge for hearing. Nor was the Court of Appeals advised that all relief requested of the trial court was forthcoming when the Petition for Prohibition was filed there and the stay order obtained pending hearing thereon. Then, as soon as Judge Chandler, then engaged in trying an important case, had time to consider the voluminous affidavit and application, and on March 9th, he issued a written order, duly filed, granting the relief sought in the application for disqualification, although finding that the affidavit was insufficient. A copy of the order was served on Occidental's attorneys on the day it was filed, March 9, 1962.

On the day of the hearing, March 12, 1962, counsel representing various interested parties appeared at the appointed hour, 2:00 o'clock p.m., at the court room of the said Court of Appeals, in Denver, Colorado, and as they entered the court room they were met by Howard W. Rea, one of the attorneys for Occidental, who was passing out some papers designated as "*Petition for Leave to Amend and Supplement* Petition for Writ of Mandamus and or Prohibition" and "Memorandum in Support of Petition for Writ of Mandamus and or Prohibition."

The purported petition for leave to amend would change Occidental's "demand" from disqualification of Judge Chandler to hear *two* motions only to one that would disqualify him

to hear "any and all matters" arising in the proceeding and "from entering any order, decision or judgment therein." Such "demand" would affect the interests of hundreds of creditors and stockholders of Parker Petroleum Co., Inc. without affording them a chance to be heard.

Also, no notice of such amendment was served on Judge Chandler; *no affidavit in support of its allegations was filed as required by Section 144, Title 28, United States Code*, in the lower court and the various counsel participating in the hearing had not previously received any knowledge of its contents. Yet the hearing conducted by the Circuit Court of Appeals on March 12, 1962 at 2:00 o'clock p.m. was purportedly based upon its allegations, of which not anybody, including Judge Chandler, prior to that hour, had any knowledge except those who did the alleging.

The Petition for Writ of Certiorari, filed herein, sets forth several serious legal questions as to the validity of the proceeding above described. The Respondent's brief in opposition evades these issues and consists principally of a scurrilous attack upon the personal integrity of a District Judge of the United States, whose long career has been one of faithful devotion to duty in his judicial capacity.

This brief will discuss first the fundamental and jurisdictional questions involved; and then specific attention will be given to the irresponsible statements appearing in respondent's brief.

The serious legal questions which, it is submitted, render wholly void the decision of the Circuit Court of Appeals, may be stated as follows:

1. Was the remedy of "Mandamus and or Prohibition"[1] available to disqualify Judge Chandler while this case was pending, or is the only remedy an appeal from the final judgment in the case?

2. If it should be held that "Mandamus and or Prohibition" is an available remedy in the situation, would not the jurisdiction of the Circuit Court of Appeals be limited to the relief alleged and sought in the affidavit filed by respondent under Section 144 of Title 28 United States Code in the Court below? After instituting a proceeding in Mandamus and or Prohibition seeking relief under allegations set forth in such an affidavit, can the affiant, by simply amending his petition in the Circuit Court of Appeals, obtain a decision on disqualification which is completely different from and at variance with that sought in the affidavit filed under said Section 144?

3. Does Section 332 of Title 28, United States Code, creating in each circuit, what is called a "judicial council" for the "effective and expeditious administration of the *business* of the courts within its circuit," confer upon the said "judicial council" any powers other than those which are "administrative?" Do the "supervisory" powers conferred by that Act upon the council include the power to disqualify a District Judge from hearing a pending case? Do we have two statutes, independent of each other,—Sections 144 and 332—under which a District Judge may be so disqualified?

4. In view of the words of Section 144, requiring the affidavit to state that the judge has a "*personal* bias or prejudice," does not a proper construction of this provision mean that the judge must have a "bias or

[1]Emphasis hereinabove and hereinafter is supplied unless otherwise indicated.

prejudice" that is of extrajudicial origin? Do not statements made by a judge, in the course of a proceeding, which are based on acts and conduct of a party to the case, constitute judicial opinion as distinguished from the "bias or prejudice" as contemplated by Section 144? Isn't this true, even though those statements are made with vehemence?

The foregoing issues will be taken up in their order.

I

The Remedy of Respondent Was by Appeal Only, and not by "Mandamus and or Prohibition"

Occidental assumed to invoke the All Writs Act, 28 United States Code 1651 (a), in presenting its Petition for Mandamus and or Prohibition to the Circuit Court of Appeals. But that remedy is not available in a case of this kind. The case of *Roche, U. S. District Judge v. Evaporated Milk Association, 319 US 21, 63 SCt 938, 87 LEd 1185 (1943)*, is in point. In that case the Supreme Court was asked to review the action of the Circuit Court of Appeals in directing, by mandamus, a District Court to reinstate certain pleas in abatement in a criminal case. In holding that the Court of Appeals acted erroneously, the Supreme Court said:

> "As the jurisdiction of the circuit court of appeals is *exclusively appellate*, its authority to issue writs of mandamus is restricted by statute to those cases *in which the writ is in aid of that jurisdiction* * * *.
>
> "The traditional use of the writ in aid of appellate jurisdiction both at common law and in the federal courts has been to confine an inferior court to a *lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so* * * *.

> "Ordinarily mandamus may not be resorted to as a mode of review where a statutory method of appeal has been prescribed or to review an appealable decision of record (citing authorities).
>
> * * * * *
>
> "Circuit courts of appeal, with exceptions not now material, have jurisdiction to review only final decisions of district courts, 28 U.S.C. § 225 (a)." (Emphasis supplied)

In *La Buy v. Howes Leather Company, 352 US 249, 77 SCt, 1LEd 2d 290 (1956)*, this Court, by a five to four decision, held that a Court of Appeals could issue a writ of mandamus requiring a district court to vacate an order appointing a Special Master to hear and decide certain issues in a case that would amount to what the Court said was an "*abdication of the judicial function* depriving the parties of a trial before the court on the *basic issues* involved in the litigation." But although this Court did uphold the issuance of a writ of mandamus in the *La Buy* case, it took particular care to limit the use of such writs, saying:

> "This is not to say that the conclusion we reach on the facts of this case *is intended, or can be used*, to authorize the *indiscriminate* use of prerogative writs as a means of reviewing interlocutory orders."

And then it reaffirmed its holding in *Bankers Life & Casualty Company v. Holland, 346 US 379 (1953)*, in the words:

> "* * * All Writs Act is meant to be used only in the *exceptional case* where there is a clear abuse of discretion or usurpation of judicial power * * *."

The very issue involved here was subsequently decided in *Albert v. U. S. District Court for Western Dist. of Michigan, 283 F2d 61 (6th Cir. 1960)*. In that case an affidavit of

bias and prejudice had been filed against a District Judge, and the Judge had refused to disqualify. An action in mandamus and prohibition was brought in the Circuit Court of Appeals to compel the District Judge to certify his disqualification. The Court of Appeals refused to grant the writ. The following statements are quoted from the opinion:

> "The order entered by the District Judge refusing to disqualify himself is not reviewable upon appeal until a *final judgment* has been entered in the case. Collier v. Picard, 6 Cir., 1956, 237 F2d 234.
>
> "Before petitioner may resort to the extraordinary writ of mandamus, he must establish that he has a clear and certain right and that the duties of the respondent are *ministerial*, plainly defined and peremptory. United States ex rel. McLennan v. Wilbur, 283 US 414, 51 SCt 502, 75 LEd 1148; United States ex rel. Girard Trust Co. v. Helvering, 301 US 540, 57 SCt 855, 81 LEd 272; Rayborn v. Jones, 6 Cir. 1960, 282 F2d 110.
>
> "In our view, the consideration by the District Judge of the sufficiency of the affidavit of bias and prejudice is not a *ministerial*, but a *judicial* act * * *.
>
> "* * * This remedy is reserved for really extraordinary causes. It may not be used as a substitute for appeal. Roche v. Evaporated Milk Association, 1943, 319 US 21, 63 SCt 938, 87 LEd 1185; Beneke v. Weick, 6 Cir. 1960, 275 F2d 38.
>
> "The writ may be granted only where it is clear and undisputable that there is no other legal remedy. Ex parte American Steel Barrel Co., 1913, 230 US 35, 33 SCt 1007, 57 LEd 1379.
>
> "Mandamus has been held not to be the proper remedy to compel a judge to recuse himself. Green v. Murphy, 3 Cir. 1958, 259 F2d 591; Korer v. Hoffman, 7 Cir. 1954, 212 F2d 211, 45 ALR 2d 930; Hurd v. Letts, 1945, 80 U. S. App D C 233, 152 F2d 121."

An application for writ of certiorari in this case was denied by this Court on February 27, 1961. *365 US 828, 81 SCt 713, 5 LEd 2d 706.*

Other cases announcing the same rule include *Green v. Murphy, 259 F2d 591 (3rd Cir. 1958); Korer v. Hoffman, 212 F2d 211 (7th Cir. 1954); Collier v. Picard, 237 F2d 234 (6th Cir. 1956).*

It is submitted that the issue here did not involve an "aid to jurisdiction" (*Roche v. Evaporated Milk Co.*, supra); nor a "usurpation of judicial power" (*Bankers Life & Casualty Co. v. Holland*, supra); nor did it fall within "the exceptional circumstances existing here." (*La Buy v. Howes Leather Co.*, supra.)

In the percuriam opinion of the "Court" (page 23a, Appendix C, Petition for Writ of Certiorari herein, also 303 F2d 55) the Court cites, as authority for the use of the All Writs Act, 28 USC 1651, in a disqualification case under § 144, its own decision in *United States v. Ritter, 273 F2d 30, 32.* Yet, that decision is not authority for the case against Judge Chandler.

There is a clear distinction between the *Ritter* case and the case at bar. In the *Ritter* case there had been two appeals. On the first appeal (220 F2d 666) the Court of Appeals found that the case was "tried in an atmosphere of maximum emotion and a minimum of judicial impartiality." On certiorari, however, the Supreme Court said "after oral argument and thorough consideration of the record we do

not find that the trial was conducted so improperly as to vitiate" the trial court's findings (351 US 173). The case went back for retrial and on second appeal to the Circuit Court of Appeals (257 F2d 920) that Court held that the trial court could not give the "calm, impartial consideration which is necessary for a fair disposition" of the case and that "he should step aside"; and that when the case was remanded further proceedings in the case be had before another judge. After denial of certiorari (358 US 899) the mandate of the Circuit Court of Appeals carried forward the Circuit Court's suggestions that further proceedings be had before another trial judge.

The trial court, however, refused to transfer the case to another judge. Thereupon, the United States filed a "motion for the entry of an amended judgment and trial before another judge," and also an order to prohibit Judge Ritter from setting the case before himself for retrial.

In granting the government's application the Circuit Court of Appeals said: "We have no doubt of our power and inescapable duty to grant the relief sought, whether it be found in the all-writ statute *or* in the exercise of the *inherent powers* of *appellate jurisdiction* to effectuate what seems to us to be the manifest ends of justice." This raises an important question: "Is a Circuit Court of Appeals possessed of 'inherent' powers to disqualify a district judge, or is that remedy by specific statute only?"

However, the issue in the *Ritter* case was entirely different from that in the case at bar. The disqualification there

had been determined on *appeal*, and the Court ordinarily has the power to do whatever is necessary to enforce its *appellate jurisdiction*. However, even in *Ritter* case there had never been filed an affidavit under Section 144 to disqualify the District Judge.

2

Occidental's Amended Petition for "Mandamus and or Prohibition" to Disqualify Judge Chandler from Hearing "Any and All Matters" Arising in the Proceeding and "From Entering Any Order, Decision or Judgment Therein," Did Not Confer Jurisdiction on the Court of Appeals to Grant the Petition for the Reason That No Affidavit Seeking Such Disqualification, Required Under Said § 144, Had Been Filed in the District Court

The basis for disqualifying a Judge of the District Court of the United States is the affidavit required by § 144, Title 28, United States Code. That statute is as follows:

> "Whenever a party to any proceeding in a district court makes and files a *timely* and *sufficient* affidavit that the judge before whom the matter is pending has a *personal bias or prejudice either against him* or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear *such proceeding*.
>
> "The affidavit shall state the facts and the reasons for the belief that bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term at which the proceeding is to be heard, or good cause shall be shown for failure to file it within such time. A

party may file only one such affidavit in any case. It shall be accompanied by a certificate of counsel of record stating that it is made in good faith."

The courts have uniformly held that strict compliance with the provisions of this statute is required, and there have probably been more decisions on this point rendered by the Court of Appeals for the Tenth Circuit than by any other Circuit Court of Appeals.

In *Scott v. Beams*, 122 F2d 777, 787 (10th Cir. 1941), that court, speaking through Judge Bratton, in a case where disqualification of a District Judge was sought, said:

"The statute thus extending the privilege of disqualifying a judge is remedial; but due to its nature and the opportunity for abuse of the privilege, *strict compliance with its provisions is exacted.*"

The foregoing case is often referred to as the famous Jackson Barnett heirship case, in which Judge Williams, of the Eastern District of Oklahoma, was charged with "general allegations of hostility of the court, abuse of witnesses, threats to have them incarcerated," etc. The Court held the affidavit for disqualification insufficient. Certiorari was denied, 315 US 809, 62 SCt 794, 795, 799, 86 LEd 1209.

Another case in which the sufficiency of the affidavit for disqualification was an issue was *Skirvin v. Mesta*, 141 F2d 668, 672 (10th Cir 1944). The question was whether the affidavit had been filed within the time required by the statute. Again this Court spoke through Judge Bratton and said:

"While the statute is remedial, due to its nature and the opportunity for abuse of the privilege which it ex-

> tends to a party litigant, *strict compliance* with its provisions is required. Scott v. Beams, 10 Cir. 122 F2d 777; Mitchell v. United States, 10 Cir, 126 F2d 550."

A much later case was that of *Martin v. United States, 285 F2d 150 (1960)*, in which Judge Wallace, of the Western District of Oklahoma, was the target of the motion to disqualify. In that case the opinion, by Chief Judge Murrah, stated:

> "The petitioner also complains of the failure of the trial court to consider his motion to disqualify himself from further consideration of the case after having denied petitioner's motions, resulting in the previous appeal in 273 F2d 775. It is sufficient to say that in the first place, *the motion does not comply with the statutory requirements for the disqualification of a trial judge*. See 28 USC § 144; Skirvin v. Mesta, 10 Cir, 141 F2d 668; Scott v. Beams, 10 Cir, 122 F2d 777."

And in *Marquette Cement Mfg. Co. v. Federal Trade Commission, 147 F2d 589 (7th Cir 1945)*, the court in referring to § 21 of the Judicial Code (which was succeeded by § 144) said that the statute must be "literally and strictly observed."

There are other cases from different jurisdictions which state emphatically that the requirements of § 144 must be complied with strictly, and such affidavits will be strictly construed. *Beland v. United States, 117 F2d 958 (5th Cir 1941), cert den 313 US 585; In re Lisman, 89 F2d 898 (2d Cir 1937)*; Cf *Ex Parte American Steel Barrel Co., 230 US 35, 43, 33 SCt 1007, 57 LEd 1379 (1913)*.

The amended petition for mandamus and or prohibition, filed herein on March 12, 1962, superseding the original

petition filed March 6, 1962, demands that Judge Chandler be disqualified "*from hearing and deciding any and all matters arising in these proceedings* (In the Matter of Parker Petroleum Co., Inc.) *whatsoever, and from entering any order, decision or judgment therein.*" This means, of course, that Judge Chandler would be completely removed from that case if the writ is granted. So the issue here is:

Does the affidavit of disqualification filed in the District Court seek the removal of Judge Chandler entirely from the case?

The answer is simple. *It does not.* The disqualification sought by the affidavit is "from deciding the motions set for hearing on March 13, 1962." Those two motions are described in the affidavit. Not only does the affidavit fail to ask for Judge Chandler's disqualification in the conduct of the case generally, but it specifically recognizes his qualification to act as judge in the case on all other matters, when it states that the judge should not decide any claims against the applicant "*other than as a member of the class of preferred stockholders of Parker Petroleum Co., Inc.*"

There are no claims against Occidental, individually, except the two mentioned in the affidavit, and the action for damages for failure to consummate the aborted plan of reorganization confirmed by Judge Wallace, 289 F2d 6. Occidental's position in this case otherwise is exactly the same as that of any other preferred stockholder, except that Occidental acquired its stock after Parker reorganization proceed-

ings had commenced. Hence the affidavit it not sufficient to require disqualification as to the entire case.

The exclusive procedure by which a District Judge can be disqualified for bias or prejudice is that prescribed in § 144. No other statute deals with such disqualification. The statute must be complied with strictly, and the affidavit *must* be strictly construed.

To say that an applicant can file such an affidavit in the District Court, and then come to the Circuit Court of Appeals by applying for the extraordinary writ of prohibition, and, at that time, change its application and seek a different disqualification of a judge, not sought in that affidavit below, is simply to ignore the statute. And there are no grounds for ignoring the statute. It has been recognized, applied and enforced in a multitude of cases. It is not to be ignored. Occidental Petroleum Corporation filed the affidavit and it is bound by its own act. It cannot enlarge or supplement the contents of that affidavit in the Circuit Court of Appeals.

It is submitted, therefore, that the amended application for a writ of prohibition is void on its face, and was insufficient to confer jurisdiction on the Court of Appeals to grant the writ.

Objection was made by Mr. Irvine, attorney for the trustee, to the filing of the amended petition of Occidental, which was offered at the hour set for hearing on the original petition. The Court asked if there were objections and the fol-

lowing colloquy occurred (Record of Hearings, March 12 and 13, 1962, before Circuit Court of Appeals, page 5):

"THE COURT (Chief Judge–Murrah): Is there any objection to the amendment?

"MR. IRVINE: If the Court please, yes, we have several serious objections. I think perhaps that they can be presented at the time that we argue this matter, or we can do so at this time.

"THE COURT (Chief Judge Murrah): Well, we have to get our pleadings straightened. We have to get our pleadings in before proceeding. That is the first thing we must do, as I understand it.

"Now, as I understand counsel, he says that he wishes to amend his petition to allege events, matters, occurring since your original petition was filed?

"MR. REA: Yes, Your Honor.

"THE COURT (Chief Judge Murrah): Well, what objection could you make to that?

"MR. IRVINE: Because, sir, they have changed their whole prayer for relief and they have not followed the statutory method of obtaining that relief. The prior petition, the one on which we are here on a show cause order, requested a writ of prohibition or mandamus to disqualify Judge Chandler from the hearing of certain specified hearings, that is, those matters which had to do with the motion to subordinate the stock of Occidental Petroleum Corporation, pending in the District Court, Western District of Oklahoma, since last May. Also, there was a question of damages that was left open by this Court in its decision in Walker versus Occidental, which was also one that is pending. They asked that the Judge be disqualified from hearing only these matters, and those matters pertaining specifically to Occidental.

"In their enlarged petition, which was filed just a short while ago, they have requested that Judge Chandler be disqualified from hearing all matters in the matter of Parker Petroleum.

"THE COURT (Chief Judge Murrah): Well, how could the Court disqualify or issue a writ of prohibition against a Judge hearing a part of a lawsuit?

"MR. IRVINE: Well, sir, all of these matters are of the reorganization of a corporation.

"THE COURT (Chief Judge Murrah): Well, just a moment.

"(The Judges of the Court conferred.)

"THE COURT (Chief Judge Murrah): Leave will be granted to amend."

In the face of all the authorities requiring strict compliance with § 144, the Court would excuse Occidental from complying with the statute by saying that a writ of prohibition cannot issue against "hearing a part of a lawsuit." The short answer to this is that a writ of prohibition cannot issue in any case where the affidavit under § 144 does not state exactly the nature of the disqualification.

There is another well-defined principle of jurisdiction applicable to Occidental's changing attitudes. In the Original Petition for Mandamus and or Prohibition it asked that Judge Chandler be restrained from entering any order on the two motions described therein, but recognized that the Judge was qualified to enter any order in the case affecting Occidental "as a member of the class of preferred stockholders of Parker Petroleum Co., Inc."

In the Amended Petition it sought to have Judge Chandler removed from the case entirely.

It is submitted, therefore, that the Court of Appeals had no jurisdiction to enter any order as to either the Original or Amended Petitions.

The Amended Petition sought a disqualification not covered by the Affidavit of Disqualification filed in the District Court, and therefore a nullity, as we contend.

The Original Petition was abandoned when the Amended Petition was filed and, therefore, has been expunged from the case.

In *Bullen v. De Bretteville, 239 F2d 824, 833 (9th Cir 1956), cert den 353 US 947, 77 SCt 825, 1 LEd 2d 856*, the court held:

> "It is hornbook law that an amended pleading supersedes the original, the latter being treated thereafter as non-existent. Nisbet v. Van Tuyl, 7 Cir, 224 F2d 66; Meyer v. State Board of Equalization, 42 Cal 2d 376, 267 P2d 257; 71 CJS, Pleading, § 321. Once amended, the original no longer performs any function as a pleading and cannot be utilized to aid a defective amendment."

In *Nisbet v. Van Tuyl, 224 F2d 66, 71 (7th Cir 1955)*, the court said:

> "An amended pleading ordinarily supersedes the prior pleading. The prior pleading is in effect withdrawn as to all matters not restated in the amended pleading, and becomes functus officio. 71 CJS 321, p. 717."

And the Tenth Circuit Court of Appeals, speaking through Judge Phillips, has said that "the amended pleading supersedes and takes the place of the original pleading." (Citing many authorities.) *Aetna Life Insurance Co. v. Phillips, 69 F2d 903 (1934).*

Therefore, it is submitted that the Original Petition is no longer a part of this case; and the Amended Petition confers no jurisdiction for the reasons and under the authorities hereinabove set forth. Hence, there was nothing before the Circuit Court of Appeals on which it could base an order of disqualification.

3

Does § 332, of Title 28, United States Code Creating a Body Called a "Judicial Council" in Each Circuit, Confer Upon the "Council" the Power to Disqualify a District Judge in a Case Pending Before Such Judge?

The final determination of this case in the Circuit Court of Appeals presented some unusual situations and resulted in some unprecedented adjudications.

Two separate bodies, each created by Congress in different years,—the Circuit Court of Appeals and the Judicial Council for the Tenth Circuit,—has each entered a separate, solemn order, reciting the same conclusions; and each orders that Honorable Stephen S. Chandler, respondent, proceed no further in the matter of Parker Petroleum Co., Inc., debtor. Each order then directed Honorable Alfred P. Murrah, Chief

Judge, to designate another judge to hear and determine all further proceedings in the said cause. The authority of the Chief Judge of a Circuit Court of Appeals to appoint a certain District Judge to hear a case in his own district is not clear. Section 137, of Title 28 United States Code, provides that such assignments shall be made by the "rules and orders" of the District Court. In the District Court for the Western District of Oklahoma there are four Judges, and the rules of that Court provide that the Court, consisting of all the Judges, shall make the assignment of cases. Section 292, of Title 28 United States Code provides for assignment by the Chief Judge of a Circuit Court of Appeals of (1) District Judges to sit upon the Court of Appeals, and (2) District Judges to hold court outside of their districts.

As pointed out hereinabove, this proceeding had its inception in the petition of Occidental Petroleum Corporation for mandamus and, or prohibition, filed in the Circuit Court of Appeals. Neither Occidental, nor any other party to this proceeding, has attempted to invoke the jurisdiction of the Judicial Council to decide anything.

Hearing were had before the Court, with Judges Murrah, Pickett and Breitenstein sitting, on March 12 and 13, and on April 10, 1962, and all parties regarded the hearings as completed at the conclusion of the hearing on said April 10. Thereafter, notices went out to interested parties for another hearing and, as stated in the Council's order, "the Court met en banc on April 20, 1962." Judges Lewis and Hill, who had not participated in the hearings before, were pres-

ent, and they with the three judges who had been sitting, constituted the Court "en banc."

On April 20, when the Court reconvened, with the five judges present, Chief Judge Murrah announced that while Judges Lewis and Hill had not participated in the earlier hearings and had not heard the evidence, they had familiarized themselves with the case. And then the order recites that "all parties present consented to the consideration of the case by the court en banc on the record as then made and as previously made."

Next, the real reason for assembling all of the five judges is revealed. The Court had decided to refer this whole case to the Judicial Council. And in the opinion of the "Council," rendered April 20, 1962, at 11:00 o'clock a.m.—after the adjournment of the "Court"—the following remarkable statement is made.

> "At the conclusion of the en banc hearing the Court affirmed the determination of the previously sitting judges that the *issues raised as to the qualification of the Honorable Stephen S. Chandler to proceed further were of such a serious nature the matter should be presented to the Judicial Council of the Tenth Circuit of the United States.*" (Pet for cert, p. 27a)

The foregoing statement raises a regular fusillade of questions, among them being:

> Why was the Tenth Circuit Court of Appeals alone incapable of deciding these "serious" issues?
>
> How serious must the issues be before the "Court" surrenders to the "Judicial Council?"

From what source does the Judicial Council receive its authority to decide these super-serious issues?

Do the same five Judges, sitting as a "Judicial Council" possess greater authority to decide these judicial questions than they do sitting as a Court?

Isn't it a fact that the Act of Congress—§ 332 of Title 28, United States Code,—creating the Judicial Council, does not give the Council the authority to decide judicial questions at all?

Is it not true that § 332 deals only with administrative matters regarding the expeditious transaction of the administrative business of the courts, and that the powers granted therein to the Judicial Council are thus limited?

The issue as to whether the Judicial Council, under § 332, has authority to "supervise" a District Court as to its judicial rulings during a pending case and prior to judgment, is a serious one.

Even more serious is the claim that the Judicial Council has the power, *on its own initiative*, to disqualify a District Judge at all, particularly at any stage of a pending case.

In this case the Judicial Council has assumed those powers. In the Council's "Order," following its convening at 11:00 o'clock a.m. on Friday, April 20, 1962, the following appears:

> "*Accordingly, pursuant to the power and authority of the Judicial Council under the Act of June 25, 1948, c. 646, § 332, 62 Stat. 902, 28 U.S.C. § 332,* it is ORDERED that the Honorable Stephen S. Chandler shall proceed no further in the Matter of Parker Petroleum Co., Inc., Debtor, No. 10807 Bankruptcy on the docket of the United States District Court for the Western District of Oklahoma."

Thus, in a "closed-door" session the Judicial Council entered an order condemning Judge Chandler for holding "closed-door sessions" in endeavoring to secure information which would assist him in deciding the administrative questions presented in the *Parker* case.

The validity of the Council's order is next discussed.

Does § 332 Confer Power Upon the Judicial Council, as Such, to Order Disqualification of a District Judge in Cases Pending Before Him?

Section 332 calls for a council to meet twice a year and to be attended by all the Circuit Judges in active service. It directs the Chief Judge to submit to the council the quarterly reports of the Director of the Administrative Office of the United States Courts, and provides that: "The Council shall take such action thereon as may be necessary." Then it provides:

> "Each judicial council shall make all necessary orders for the effective and expeditious administration of *business* of the courts within its circuit. The district judges shall promptly carry into effect all orders of judicial council." (June 25, 1948, c. 646, 62 Stat 902

Section 332 is based on Chapter 501 of the Act of Congress of August 7, 1939 (53 Stat 1223). In that Act the Congress added to the Judicial Code of March 3, 1911 (Vol 36 U.S. Stat. at Large, pp. 1087 et seq), as stated in the enactment clause, "a new chapter to be numbered XV and entitled 'The Administration of the United States Courts'." The entire act of August 7, 1939 has to do purely with *admin-*

istrative matters, and not *judicial actions*. The first section (§ 302) creates "an establishment to be known as the *Administrative* Office of the United States Courts, with a Director at the head thereof * * *." The succeeding sections,—303, 304 and 305,—provide for employees to assist the director; the employment of "administrative personnel" of the courts, examination of court dockets; "preparation of statistical data and reports of the *business* transacted by the courts;" disbursement of money appropriated for the maintenance and operation of the courts; the purchase etc. of equipment and supplies; and such other matters.

Section 306 follows and it is in these words:

> "*To the end that the work of the district courts shall be effectively and expeditiously transacted*, it shall be the duty of the senior circuit judge of each circuit to call— a council composed of the circuit judges for such circuit who are hereby designated a council for *that purpose*—."

Then § 306 continues with: "The senior judge shall submit to the council the quarterly reports of the Director * * * and such action shall be taken thereon by the council as may be necessary."

Then follows this sentence:

> "It shall be the duty of the district judges promptly *to carry out the directions of the council as to the administration of the business of their respective courts*."

Section 332 of Title 28, United States Code, is based on § 306 of the Act of Congress of 1939. In the Reviser's Note to this section it is stated that certain changes were made in

the phraseology of § 306 as it was carried forward into the 1948 recodification, *but there was no change in the intent or meaning of the Act. It deals purely with administrative matters of the courts.* Indeed, the very fact that the supervision covered by § 306 is to be administered by the circuit judges as a *council*, and not as a *court*, would seem to be conclusive that supervision of *judicial* acts of the district courts was not contemplated by that statute. The procedure for reviewing judicial acts of the district courts had already been fixed by the Judicial Code long before § 306 was enacted.

Section 144, of Title 28, United States Code, providing for the disqualification of district judges, was a part of the Act of Congress of March 3, 1911. As said by the Supreme Court in *Ex Parte American Steel Barrel Co., 230 US 35, 44, 33 SCt 1007, 57 LEd 1379 (1913)*:

> "The proceeding to retire a trial judge of the United States Court from further hearing a case of which he has jurisdiction, had its origin in the new Judicial Code, effective January 1, 1912 and constitutes § 21 of that Code."

Section 21 of the original Judicial Code was carried forward in the 1940 edition as § 25 of Title 28, United States Code, and appears in current (1948) codification as § 144 of Title 28, United States Code.

Thus, the present § 144 has been on the statute books as the exclusive procedure for disqualifying a district judge since January 1, 1912. Is it to be presumed, then, that a

"council," created for administrative purposes only, has succeeded to the judicial powers not even mentioned, directly nor indirectly, in the statute creating such a body? It is a well-settled rule that a statute conferring certain general powers will not be construed as applying to cases covered by a prior special act upon the same subject.

It should be remembered that § 144 became a law on January 1, 1912; whereas § 332 did not become a law until August 7, 1939. Section 144 is a statute dealing specifically with disqualification of a district judge; § 332 deals with specific powers of a "council," composed of circuit judges, for the purpose of promoting the effective and expeditious transaction of the administrative business (work) of the Courts. Both statutes were carried forward in the 1949 and 1948 editions of the United States Code. The rule stated in *Washington v. Miller*, 235 US 422, 428, 35 SCt 119, 59 LEd 295 (1914), is directly applicable to this situation. There the court said:

> "Where there are two statutes upon the same subject, *the earlier being special, and the later general*, the presumption is, in the absence of an express repeal, or an absolute incompatibility, that *the special is intended to remain in force as an exception to the general*. (Townsend v. Little, 109 US 504, 512; Ex Parte Crow Dog Id., 556, 570; Rodgers v. United States, 165 US 83, 87-89.)"

Other cases announcing this same rule of construction are:

Baltimore National Bank v. State Tax Commission of Maryland, 297 US 209, 215, 56 SCt 417, 80 LEd 586 (1936);

Rodgers v. United States, 185 US 83, 22 SCt 582, 46 LEd 816 (1902);

Johnson v. Washington, 190 US 179, 185, 23 SCt 825, 47 LEd 1008 (1903);

United States v. Nix, 189 US 199, 205, 23 SCt 495; 47 LEd 775 (1903), where it is said specifically: "The rule of statutory construction is well settled that a general act is not to be construed as applying to cases covered by a prior special act upon the same subject."

Bulova Watch Co. v. United States, 365 US 753, 758, 81 SCt 864, 6 LEd 2d 72 (1961), where this Court said: "It is a familiar law that a specific statute controls over a general one without regard to priority of enactment." (Citing cases.)

Ruth v. Eagle-Picher, 225 F2d 572, 574 (10th Cir 1955), a decision by the same court that issued the disqualifying order in this case. Many authorities in support of this rule are cited in the opinion of Judge Phillips in the *Eagle-Picher* case.

It is therefore respectfully submitted that the Judicial Council of the Tenth Circuit, as such, is not vested with judicial powers, and particularly the power to order disqualification of District Judges in pending cases. It is respectfully submitted that § 144, of Title 28, United States Code, is the exclusive remedy for such disqualification.

Reviewing the evidence in this case, it would appear that the sitting judges had made an early determination to refer the disqualification of Judge Chandler to the Judicial Council as such. Whether that decision was influenced by the uncertainty which existed as to whether the amended petition of Occidental conferred jurisdiction upon the Court is only speculative. However, the Council's order recites that the "sitting judges" had previously decided on that course, and in the hearings before the Court evidence was admitted that bore no relation to the "bias or prejudice" issue.

For example, in answer to an objection of Mr. Irvine, the Court, speaking through Judge Murrah, said (Transcript of Proceedings in Circuit Court of Appeals, March 12-13, 1962, p. 159):

> "We are not just trying an affidavit of prejudice here—if you think that that is the scope of the inquiry, the legal sufficiency of an affidavit of prejudice.
>
> "This Court sits to exercise its supervisory powers, and there are plenty of cases, if you will refer to them in the books, from this Court, to illustrate that very point. We are not just sitting here to decide the legal sufficiency of an affidavit to disqualify a trial judge. We are sitting here in the exercise of our supervisory powers as a court, to determine whether or not in the whole matter of the proceedings here there should be some action on the part of this Court, in the exercise of those powers, which are undisputed. And in doing so, we apprehend that it goes beyond the mere legal sufficiency of an affidavit to disqualify."

The foregoing statement indicates that the Court, purporting to be trying the issues raised in the Amended Petition of Occidental, was going to admit *any* evidence which, in the

opinion of the Judges, would constitute improper conduct of any kind, and this they certainly did. Therefore, this was not a proceeding under § 144. In fact, it was not a proceeding authorized under any statute. However, the Judges may have concluded that § 332 conferred upon them absolute power to control every act of a District Judge in a case pending before him. And it is respectfully submitted, as argued above, that the Judicial Council has no authority to control any judicial act of a District Judge.

Another situation appeared to arouse the resentment of Chief Judge Murrah against an attorney who raised a jurisdictional question. The attorney was Kirk Windle, attorney for the Securities and Exchange Commission, who has participated in this case from its beginning. Mr. Windle was presenting an argument against the disqualification of Judge Chandler and his remarks appear in the Transcript of Proceedings in the Circuit Court of Appeals of April 10, 1962, pages 70 to 80, inclusive. Explaining his connection with this case, and presenting the Commission's position and views on the disqualification of Judge Chandler, the following is quoted from the said record:

> "MR. WINDLE: If the Court please, there really isn't much left to be said after Mr. Irvine's statement and after Mr. Crowe's statement. The Commission, as Your Honors know, participates in Chapter 10 reorganization proceedings, pursuant to Section 208 of Chapter 10. We act as an adviser to the Court and we act as a protector of the public investor interest in those cases.
>
> "As such, we have been in the Parker Petroleum reorganization from its beginning, both under Judge Wallace before his death and under Judge Chandler. We

have filed a memorandum in which we conclude that this matter is not properly before this Court, that the petition that was filed by the Petitioner is not in compliance with the established rules that have been laid down by the Supreme Court, in the Federal Rules of Civil Procedure and in the established cases.

"We conclude that, even if the matter were properly before this Court, the evidence which has been presented by the Petitioner is not, in our opinion, sufficient to warrant the exercise of the extraordinary writs of mandamus or prohibition, insofar as either disqualifying Judge Chandler from hearing the matters pertaining to Occidental Petroleum Company, or certainly not as to removing him from the entire case.

"THE COURT (Judge Pickett): Mr. Windle, I have a little difficulty in understanding the interest of the Securities and Exchange Commission in a proceeding of this kind.

"MR. WINDLE: Well, Your Honors—

"THE COURT (Chief Judge Murrah): Well, I do too. We are not interested in the feasibility of this plan, and we are just interested in a very narrow issue, and what business is it of the S.E.C. about who tries it or who decides it?"

Later Mr. Windle then stated why he thought this case was improperly before the Circuit Court of Appeals. That statement, and the Court's reply, appear on page 74 of said record:

"MR. WINDLE: No, Your Honor. In the Ritter case the matter was properly before this Court on an appeal. In this case it is improperly before this Court on a petition for mandamus or prohibition, because of the failure of Judge Chandler to rule on the affidavit of bias and prejudice when he hadn't time to do so.

> "THE COURT (Chief Judge Murrah): As far as I am concerned, Mr. Windle, I don't think you have any standing in this Court. I don't think it is any business of the S.E.C. who has jurisdiction of this subject matter; and I should think that the two of you would have something else to do besides coming here on matters of this kind. This is a matter that the parties are interested in. I fail to see how the S.E.C. has any standing in this matter."

Thus, is seems evident that the Court did not consider that its jurisdiction to disqualify Judge Chandler was limited by § 144. The Securities and Exchange Commission has the right and the duty to appear in reorganization proceedings before the "Court," under § 208 of Chapter 10. It is therefore impossible to determine the source of the claimed jurisdiction, unless it was asserted under § 332; and Judge Murrah's criticism of the Securities and Exchange Commission is hardly understandable.

4

The Bias or Prejudice Issue

The petitions of Occidental Petroleum Corporation herein charge "bias or prejudice" on the part of Judge Chandler. Recovery must be based on:

> (1) Compliance with the requirements of the statute providing for disqualification of a Judge for alleged bias or prejudice, and
>
> (2) Whether the statements of the Judge constitute "personal bias or prejudice" as those statutory words have been construed by this Court and the Circuit Courts of Appeal.

The issue of complying with the formal requirements of the statute has been argued under 2 above.

The question here under consideration is whether the questioned statements of the Court constituted "personal bias or prejudice," as those words, used in § 144, have been analyzed and construed by the courts, or were an expression of judicial opinion, based on the acts and statements of Occidental and its representatives in the *Parker* case.

The courts have had much to say about what constitutes "personal bias or prejudice." In construing this very statute this Court in *Ex Parte American Steel Barrel Co., 230 US 35, 43, 33 SCt 1007, 57 LEd 1379 (1913)*, said:

> "The basis of the disqualification is that 'personal bias or prejudice' exists, by reason of which the judge is unable to impartially exercise his functions in the particular case. It is a provision obviously not applicable save in those rare instances in which the affiant is able to state facts which tend to show not merely adverse rulings already made, which may be right or wrong, but facts and reasons which tend to show personal bias or prejudice. It was never intended to enable a discontented litigant to oust a judge because of adverse rulings made, for such rulings are reviewable otherwise, but to prevent his future action in the pending cause. Neither was it intended to paralyze the action of a judge who has heard the case, or a question in it, by the interposition of a motion to disqualify him between a hearing and a determination of the matter heard."

In *Henry v. Speer, 201 Fed 869, 872 (5th Cir 1913)*, the Court, in referring to the affidavit charging bias and prejudice, said:

> "Owing to the nature of the statute and its liability to abuse, we are inclined to hold those seeking to avail themselves of it to a strict and full compliance with

provisions. Its perusal reveals the facts and reasons advanced in support of the charge of bias and prejudice do not tend to show the existence of a personal bias or prejudice on the part of the Judge toward petitioner, *but rather a prejudgment on the merits of the controversy and against deponent's right to recover. Section 21 is not intended to afford relief against this situation.*"

In *Ferrari v. United States, 169 F2d 353 (9th Cir 1948)*, the court said:

> "Section 21 of the Judicial Code 28 U.S.C.A. § 25, provides that as a prerequisite to the disqualification of a judge personal bias must be shown, which has been held to be an *attitude of extrajudicial origin*. Craven v. United States, 1 Cir., 22 F2d 605. Judicial opinion formed *on evidence in a hearing* against others is not personal bias or prejudice requisite to the right of disqualification. Parker v. New England Oil Corp., 13 F2d 497. Judgment affirmed."

In *Knapp v. Kinsey, 232 F2d 458, 466 (6th Cir 1956)*, the court said:

> "The bias or prejudice which will disqualify a judge must be 'personal' bias or prejudice as distinguished from a judicial one. Craven v. United States, 1 Cir., 22 F2d 605, 607-608, certiorari denied 276 US 627, 48 SCt 321, 72 LEd 739; * * *. A Judge is not disqualified merely because he believes in upholding the law, even though he says so *with vehemence*. Baskin v. Brown, 4 Cir., 174 F2d 391; Foster v. Medina, 2 Cir., 170 F2d 632."

In *Baskin v. Brown, 174 F2d 391, 394 (4th Cir 1949)*, the court said:

> "A judge cannot be disqualified merely because he belives in upholding the law, even though he says so *with vehemence*. Personal bias against a party must be shown. Berger v. United States, 255 US 22, 25, 41 SCt

230, 65 LEd 481, Ex parte American Steel Barrel Co., 230 US 35, 33 SCt 1007, 57 LEd 1379; Henry v. Speer, 5 Cir., 201 F. 869; Saunders v. Piggly Wiggly Corporation, D.C., 1 F2d 582; Craven v. United States, 1 Cir., 22 F2d 605, 607-608. As was well said in the case last cited:

> "'Personal' characterizes clearly the prejudgment guarded against. It is the significant word of the statute. It is the duty of a real judge to acquire views from evidence. The statute never contemplated crippling our courts by disqualifying a judge, solely on the basis of a *bias* (or state of mind, 255 US 42, 41 SCt 236, 65 LEd 481) against wrongdoers, *civil or criminal, acquired from evidence presented in the course of judicial proceedings before him.* Any other construction would make the statute an intolerable obstruction to the efficient conduct of judicial proceedings now none too speedy or effective'."

Judge Parker's opinion in the *Baskin* case was followed by the Supreme Court of the United States in *Terry v. Adams, 345 US 461, 73 SCt 809, 97 LEd 1152 (53).*

Perhaps no case is so clearly applicable to the issue here as the case of *Scott v. Beams, 122 F2d 777 (10 Cir. 1941)*, known as the *Jackson Barnett* case. In a very thorough opinion by Judge Bratton the "bias or prejudice" statute was analyzed and construed. As to the contents of the affidavit, the opinion, after referring to certain specific items, continues as follows:

> "Otherwise the affidavit abounded with general allegations of hostility of the court, abuse of witnesses and threats to have them incarcerated, and encouragement of attorneys for other litigants in their abuse of such witnesses; but these were conclusions, not statements of fact * * *.

"The record indicates that the attitude of certain attorneys was provocative at times, and the court was justified in the belief that some of the testimony was fabricated. Still, we are not to be understood as approving all of the statements, comments and criticisms coming from the court, or the excess of interference with the attorneys in their examination of witnesses. But there is no showing whatever that the complaining parties failed to introduce all of the evidence which was available to them. And we think the court reached the right conclusion in the end."

This rule was apparently recognized by Judge Pickett in the hearing on April 10, 1962. The question raised by Judge Pickett was that Occidental would not be hurt if the two motions, which constituted the only basis for disqualification set forth in the original petition, were assigned to another Judge. Mr. Barefoot's answer and Judge Pickett's reply are as follows:

"MR. BAREFOOT: * * * But, in addition to these two specific items, we simply feel that there is a broader consideration to be given to this matter, in view of what the record has shown, a point to which I would like to address myself shortly.

"THE COURT (Judge Pickett): *But it doesn't occur to me that we could set out to punish a Judge for injudicious action or intemperate statements,* and if that would be the result of his complete disqualification because of that, *it would be a different thing* than his deciding something against your certain parties simply as a result of bias and prejudice. *We can't control the act[illegible] of a Judge any more than we can of many other human beings.* I can only say it is regrettable." (Record, Proceedings before Circuit Court of Appeals, April 10, 1962, pp. 113-14)

Also, as will be shown hereinafter, the claim of disqualification of Judge Chandler did not arise until the Judge announced that he would reject the offer of "financing" the debtor corporation in the reorganization proceedings, as made by Occidental, because of the misrepresentations, conduct and attitude of its officers and representatives. This amounted to nothing more than notice that the Court would rule adversely to Occidental on its "financing" project. It isn't denied that the rejection was couched in words that were sharp and vehement. However, the rule is well settled that adverse rulings are not evidence of "personal bias or prejudice."

In *Palmer v. United States, 249 F2d 8, 9 (10th Cir 1957)*, the Court said:

> "The allegations contained in petitioner's affidavit are but complaint of adverse rulings made by the court and subjective conclusions as to the court's motives and manner in conducting the trial and subsequent proceedings. Such claims do not meet the requirements of 28 U.S.C.A. § 144: See Berger v. United States, 255 US 22, 41 SCt 230, 65 LEd 481; Scott v. Beams, 10 Cir., 122 F2d 777; Calvaresi v. United States, 10 Cir., 216 F2d 891; Inland Freight Lines v. United States, 10 Cir., 202 F2d 169."

And in *Littleton v. De Lashmutt, 188 F2d 973, 975 (4th Cir 1951), cert den 342 US 897, 72 SCt 229, 96 LEd 672*, the court said:

> "The District Judge properly refused to disqualify himself on the grounds of bias and prejudice, as the affidavit filed was clearly insufficient under 28 U.S.C.A. § 144. If after losing a case a party could have it re-

> tried on motion and could swear off the judge who ruled against him on the ground of the rulings, there would be no end of litigation. The statute contemplated no such absurdity. The bias or prejudice which can be urged against a judge must be based on something other than rulings in the case. See Ex parte American Steel Barrel Co., 230 US 35, 43, 33 SCt 1007, 57 LEd 1379; Berger v. United States, 255 US 22, 31, 41 SCt 230, 65 LEd 481."

And in *Martin v. United States, 285 F2d 150 (10th Cir. 1960)*, Chief Judge Murrah, speaking for the Tenth Circuit Court of Appeals, cited *Palmer v. United States*, supra, and announced the rule:

> "But, even so, the adverse rulings of the court are not legal grounds for disqualification."

Next, an analysis of the fact which gave rise to the claim by Occidental of disqualification of Judge Chandler will follow.

The Factual Situation as Related to the Claim of Bias and Prejudice

Occidental Petroleum Corporation, on June 10, 1960, withdrew from the plan of reorganization which it had proposed and which had been confirmed by the Court. The Circuit Court of Appeals held that Occidental had the right to withdraw in its opinion, rendered February 7, 1961. *Occidental Petroleum Corp. v. Walker, 289 F2d 1.*

Thereafter, efforts were renewed to obtain a plan of reorganization from other sources. Western Oil Fields, Inc. became interested and decided to present a plan. It was thought

that with the pledging of all the assets of both Parker and Western, adequate financing could be obtained. This was the situation that set every interested party to work on a new plan. Judge Chandler gave much of his time and effort to this undertaking; he interviewed numbers of persons who exhibited an interest in this project. He was trying to get the creditors paid, and preserve the remaining equity for stockholders, some of whom had their life savings invested in that equity.

The record shows that on October 3, 1961 Judge Chandler entered an order giving the parties until October 20, 1961 to file a plan of reorganization. The time was later extended to November 3, 1961.

It was about this time that Occidental injected itself once more into this reorganization proceeding. About October 23 or 24, 1961 Mr. Bert Barefoot, who had been Occidental's attorney, called Judge Chandler and told him he thought he could provide the financing for the Western plan. It developed that Mr. Barefoot, at that time, was acting at the instance of Mr. Hayutin, who was associated with Occidental in its dealings with the debtor estate. (Transcript of Testimony before Circuit Court of Appeals, March 12-13, 1962, p. 22)

On November 2nd Mr. Barnholt, President of Western Oil Fields, Inc., met Mr. Hayutin in Oklahoma City at the Skirvin Tower Hotel; and in that conversation Mr. Hayutin wanted to know if Western would pledge all of its assets along with those of Parker. Mr. Barnholt told him such

assets would be pledged, and then it was that Mr. Hayutin said he would arrange the financing, using the words "I can do it." Mr. Hayutin, for his services, was to receive a "finder's fee," that is the right to purchase between two and three hundred thousand shares of Western stock at $1.25 per share. He said part of these shares would be allocated among several of his associates. Mr. Barefoot was present at least part of the time during this conversation. (See Transcript of Proceedings on January 20, 1962, pages 44 et seq.)

On November 1st Mr. Barefoot had called Judge Chandler, told him that Mr. Hayutin would be in Oklahoma City on November 2nd and that he would like to bring Mr. Hayutin to his office for an "in chambers" session. Judge Chandler told him he did not want to see Mr. Hayutin, but upon Mr. Barefoot's insistence that he talk to Mr. Hayutin "off the record" he (Judge Chandler) agreed to do so if Mr. Barefoot would be present and the Judge's law clerk could also be present. No reporter was present. (It is also to be noted that Mr. Barefoot and Mr. Hayutin asked that Mr. Hayutin be permitted to talk "off the record" on January 23rd. See pages 90 and 91 of the Transcript of that date.) Nowhere did the Judge talk "off the record," but stated openly his conclusions, as is shown by the records. It is apparent that the Judge did this for his own protection and to perpetuate the exact statements of the other parties to the conferences.

What happened next is best understood by referring to Judge Chandler's statement (Record of Proceedings in Cir-

cuit Court of Appeals of April 10, 1962, p. 15, shown as Respondent's Exhibit 4):

"As per your request, I am detailing herein certain facts concerning my conversations with Mr. Bert Barefoot with regard to the financing of the Western plan of reorganization, and concerning the testimony of Mr. Russell Ingram on March 12th, 1962, before the Court of Appeals.

"About October 23 or 24, 1961, Mr. Barefoot called me and informed me that his client, Mr. Marvin Hayutin, thought he could provide the financing for the Western plan. On November 1, 1961 Mr. Barefoot called me and asked me if his client, Mr. Hayutin, could come to see me the next day. I informed Mr. Barefoot that I did not want to see Mr. Hayutin, but upon his insistence that I talk to Mr. Hayutin off the record, I agreed to do so, provided Mr. Barefoot and my law clerk would also be present.

"In the conference of November 2nd, 1961, Mr. Hayutin, among other things, said he would see to it that the money for the plan was made available.

"I saw Mr. Barefoot many time between November 3rd and December 15th relative to financing of the plan and was continually assured by Mr. Barefoot that the money will be here.' In addition during this same period of time I frequently called Mr. Barefoot about the financing when he informed me that he had the money as promised, and each time was assured by him that the money would be coming at once.

"Prior to the hearing on Friday, December 15th, 1961, Mr. Barefoot told me in chambers, before court, that he knew that the money would be here the following day, Saturday, by noon, and at the latest the following Monday, December 18th, and strenuously urged that I confirm the plan without the money actually being in court.

"The money was not here on December 18th; nor did it come in on December 22nd, the definite date set at the hearing on December 15th for it to be paid into court. Upon repeated requests of Mr. Barefoot, I gave further extensions of time to obtain it.

"I became so concerned about the situation that while holding court in Kansas City on January 8th, 1962, I called my secretary in Oklahoma City and asked her to call Mr. Barefoot and see if the money had come. It had not. When I returned to Oklahoma City from Kansas City on January 16th, I called Mr. Barefoot about the matter again, and was told that Mr. Barefoot would have the money the next day.

"On January 17, 1962, Mr. Barefoot and Mr. James Fellers brought to me not the money, but a telegram from the United Bank of California, setting out fifteen conditions upon which it would furnish only a part of the money needed, which was entirely unsatisfactory. A commitment without strings had always been required and promised."

It was in the conferences of November 1st and 2nd, 1961, that Judge Chandler was first advised that the financing could be procured by Occidental Petroleum Corporation. No objection to this was raised by Judge Chandler; in fact, he invited them to secure this financing from Occidental. (Transcript of Proceedings before Circuit Court of Appeals March 12-13, 1962, testimony of Attorney Barefoot, p. 22)

In the hearing held on December 15, 1961, in which Western's plan was confirmed, the confirmation was based upon the statements of Mr. Barefoot, who has represented both Occidental Petroleum Corporation and Western Oil Fields, Inc. in this proceeding.

Mr. Barefoot, purportedly speaking as attorney for Western Oil Fields, Inc., went into detail as to how the financing for the plan of reorganization, in the amount of $2,500,000, would be obtained. (Record of December 15, 1961, pages 5 to 17, inclusive) In asking the Court to confirm the plan of reorganization on the basis that the "money" would be "available at the time it is needed," Mr. Barefoot said (Record December 15, 1961, p. 5):

> "MR. BAREFOOT: I might say, too, your Honor, that we at this time do not have two things. We do not have a check for two and a half million dollars, and neither do we have a written commitment to present to your Honor at this time from any bank which guarantees the payment of the two million and a half dollars. I can say to your Honor that I personally, today, have been in telephonic communication with the executive vice president of a very large national bank and that he has told me that he is in receipt of information from an Independent Geological Engineer who has made a survey of the Western Oil Fields, Incorporated, properties and that based upon those figures, I can unequivocably say to your Honor that within the time that the *money* is necessary to be filed in this Court for distribution to the creditors and for payment of the administration expenses that the *money* coming from the national bank institution and from a group of private investors will in the amount of two and a half million dollars—*in that amount will be available at the time it is needed.*"

Further in his statement to the Court, Mr. Barefoot said (Record, December 15, 1961, p. 6):

> "And that if, and in the event a fact which we do not know as of this exact moment, except, if it is necessary, we do know and I pledge to your Honor as an officer of this Court that I personally am positive that it is avail-

> able and if any outside investment is needed, then the security for that investment will be a mortgage or some type of lien which will be subordinated not only to the lien of the bank but also subordinated to the lien of the Series A. Notes."

And further in the statement Mr. Barefoot said (Record, December 15, 1961, p. 12):

> "I think your Honor recognizes that I am laboring under some difficulty in not having this written commitment here today; but I think, your Honor, and I hope your Honor, also recognizes that if I did not have this assurance which I think is requisite to the statement I have made here today, then I would not have made the statement."

The "money was not forthcoming as promised, however, and Judge Chandler, as shown above, kept extending the time at Mr. Barefoot's request. Previously, the Judge had set a deadline for Western to produce its financing as of January 30, 1962.

Finally, on January 17, 1962, just thirteen days before the deadline date set for Western to obtain its financing (upon the failure of which the pledge of Western to dedicate all its resources to the financing of the plan would be in default) Mr. Barefoot and Mr. Fellers, another of Occidental's attorneys, appeared at Judge Chandler's office, not with the promised money, but with a telegram from Occidental's bank, the United Bank of California, setting out fifteen conditions upon which it would furnish less than half of the money promised.

A copy of the said telegram is attached hereto as Exhibit 1, for this brief, but a consideration of only several of the

fifteen conditions will show why Judge Chandler became convinced that Occidental had never intended to furnish the "money," but was submitting a financing plan by which it could ultimately take control and dominion over Western Oil Fields, Inc., after its consolidation with Parker Petroleum Co., Inc. The telegram was dispatched, not to the Court or the trustee, but to Bert Barefoot,[2] attorney, at Oklahoma City, and R. M. Barnholt, Jr. (President of Western Oil Fields, Inc.), at Denver.

Some of the conditions demanded by Occidental's California bank in the telegram—which was offered in lieu of the promised "money"—are:

> (1) Instead of lending the two million dollars promised, the California bank would only furnish $700,000 of that amount and would not furnish any part of the $700,000 until it should receive a commitment of $500,000 each from Continental Illinois National Bank of Chicago and First National Bank of Denver to "participate" in the loan.
>
> This was the first information to Judge Chandler that Occidental expected any bank other than the California bank to participate in the loan.

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[2] It is not clear as to whom Mr. Barefoot was representing at this time. Previously, when Occidental Petroleum Corporation had its plan of reorganization before the District Court, he was a member of the firm that represented Occidental. On November 2, 1961 he appeared as attorney for Mr. Hayutin, Occidental's representative. (Transcript, Circuit Court of Appeals March 12-13, 1962, page 22.) On November 3, 1961 Mr. Barefoot was engaged as counsel by Western Oil Fields, Inc. That relationship terminated January 30, 1962. (See Mr. Barnholt's testimony in answer to Mr. Barefoot's questions, Transcript, Circuit Court of Appeals March 12-13, 1962, page 104.) Mr. Barnholt testified that he discontinued the services of Mr. Barefoot on account of "conflict of interest," explaining that Mr. Barefoot had also been representing Mr. Hayutin, who was "attempting or assisting in the financing of the plan of reorganization." (Id. pages 130-131.) As shown hereinabove, Mr. Hayutin was assisting Occidental Petroleum Corporation in the matter of a loan for Western Oil Fields, Inc. Thereafter, Mr. Barefoot appeared in the proceeding before the Circuit Court of Appeals as attorney for Occidental Petroleum Corporation, and in that capacity he was interrogating his former client, Mr. Barnholt, as above mentioned.

(2) A guarantee by Occidental Petroleum Corporation of a note for $300,000 to be paid "from the proceeds of the sale of the assets of Donnell Drilling Company, a wholly owned subsidiary of Western, including drilling rigs, other equipment, and real properties located in Odessa, Texas."

There had been no previous suggestion that Western would be required to sell its drilling rigs, which it needed, to repay $300,000 of the loan.

(3) "The formation of an executive committee consisting of five men, *all of whom are satisfactory to the Bank and which committee must have approval of at least four members for all major expenditures and material changes in operations;* and that the board of directors of Western will be increased from seven to nine, and the two new members will be satisfactory to the bank. *The two new members will be members of the new executive committee.*"

Since the two new members of the board would be members of the executive committee, and four of the five members are necessary to approve "all major expenditures and material changes" it follows that the two new members to be selected by Occidental through its bank could veto any such expenditure or change proposed by a majority of the committee.

The remaining provisions of the telegram will not be discussed here except to call attention to the fact that the examination of titles to hundreds or thousands of properties would require many months, delay the consummation of the plan of reorganization indefinitely, and entail tremendous fees and expenses, all of which would be borne by Western. Furthermore, the use of such vague expressions as "must be acceptable to the bank," and must be "acceptable to our

counsel" as applied to about every phase of the proposed loan, gives the whole proposal an atmosphere of great uncertainty. Apparently, the bank would reserve the right to withdraw its proposal at any time by the simple expedient of saying that something is "not acceptable."

A consideration of the conditions set forth in the said telegram will be conclusive that Occidental Petroleum Corporation was not acting in good faith. There was a plan or reorganization that had been accepted by all parties. It called for certain financing. Occidental, through its attorney, offered to provide the "money" required. Instead, after many delaying actions, it caused a telegram to be sent, and in that telegram a proposal was made, which, among other things, would give Occidental control of Western Oil Fields, Inc., would provide less than half of the money promised, and would require the sale of some needed assets by Western. None of the fifteen conditions demanded in the telegram had ever been suggested before. The money had been promised without condition. As Judge Chandler says, "A commitment without strings had always been required and promised."

It is submitted that Judge Chandler's indignation, caused by Occidental's misrepresentations and hypocritical conduct, was fully justified. Occidental defaulted on its solemn promises to produce the money. It demanded control of Western Oil Fields, Inc. as the price of providing less than half of the money promised. It would require Western to dispose of some badly needed assets that would probably bring only sacrificial prices, since such sale would partake of the nature of a forced sale.

Furthermore, the Judge was convinced that Occidental's delaying tactics were deliberate, and intended to "have Western in a position where before the 30th they couldn't go anywhere else and get the money." (Transcript, Conference on January 23 and 24, 1962, page 60)

In other words, Judge Chandler had given Western until January 30, 1962 to secure its financing. By waiting until January 17,—just thirteen days before the deadline—to submit its so-called "financing" plan, Occidental believed that Western would be forced to accept its harsh terms, because it would not then have enough time to procure its financing elsewhere. To put it another way, Occidental would use the Judge's deadline order to force acceptance of its unholy plan.

It is not denied that Judge Chandler made some strong statements about Occidental in connection with this matter. But "vehemence" alone does not constitute "personal bias and prejudice." *Ex parte American Steel Barrel Co.*, supra; *Scott v. Beams*, supra; *Baskin v. Brown*, supra.

Again, Judge Chandler's statements were not "of extrajudicial origin;" they were statements of "judicial opinion formed on evidence" and such statements do not constitute personal bias and prejudice under § 144. *Ferrarri v. United States*, supra; *Craven v. United States, 22 F2d 605 (1st Cir 1927); Martin v. United States, 285 F2d 150 (10th Cir 1960).*

At this point we digress for the purpose of setting forth some happenings that took place in California, and to show definitely that it was Occidental Petroleum Corporation and

Dr. Hammer, its president, whom Mr. Hayutin was representing when he said he would "get the money." (Transcript of Proceedings, January 20, 1962, page 65 et seq.)

Mr. Barnholt's testimony shows that he was leaving the securing of the financing to Mr. Hayutin (Tr. p. 65); but about the third or fourth week in November, at Mr. Hayutin's request, he went to California. Mr. Hayutin wanted him to meet Dr. Hammer. Mr. Hayutin said Dr. Hammer would assist "greatly in the financing" etc. (Tr. p. 68)

Mr. Barnholt and Mr. Berglund, another director of Western, went to Los Angeles as requested and met Hayutin, who took them to Dr. Hammer's home for a conference. What happened then and thereafter is detailed at length in the transcript, pages 65 through 125, but a summary thereof discloses:

(1) Mr. Hayutin was depending on Dr. Hammer to secure the financing.

(2) The money was to come from "Hammer's bank," the United Bank of California.

(3) Dr. Hammer was to conduct all the necessary negotiations with the bank.

(4) Dr. Hammer then later stated that the report of Mr. Polumbus, the petroleum engineer, as to the nature and value of the reserves to be pledged for the loan, and which it was understood would be acceptable to the bank, was not going to be sufficient; that the bank wanted another report—"another independent report on the properties." This was a week after the first conference.

(5) Then another engineer named Olson was employed, but he wouldn't set any particular time for completing

his report. He said it would be at least six weeks, and he wouldn't promise that.

(6) Dr. Hammer then reported that the bank was withdrawing its offer of a loan because apparently it didn't understand the Polumbus report, but Barnholt was later assured that Dr. Hammer "had straightened it out with the bank."

(7) This was late in December, and then Mr. Barnholt went to New York to meet Dr. Hammer and Hayutin, but nothing could be accomplished because Dr. Hammer was "going to Mexico the next day."

(8) Then Hayutin and Barnholt flew to Los Angeles on January 2nd and had an appointment with Dr. Hammer, but as Mr. Barnholt testifies (Tr. 84), "I'd say we got the stalling tactics again."

(9) Then, as Mr. Barnholt testifies, he became very "upset" with Dr. Hammer because the date set by the court for consummating the plan, January 30, 1962, was rapidly approaching and Dr. Hammer was doing nothing apparently to finalize the promised loan. So Mr. Barnholt left and returned to Denver. Mr. Berglund and Hayutin remained and kept an appointment with Hammer but got no satisfaction whatever.

(10) On Friday night, January 5th, Barnholt called Hayutin by telephone and told him that he, Barnholt, was going to Oklahoma City on Monday, January 8th, "to report my position to Judge Chandler;" and further said, "Mr. Hammer has put us in a position where we cannot go to another bank, or we have not been able to go to another bank up to now."

Further, Mr. Barnholt said: "I've got to tell the court that we're going to look elsewhere for a loan and I am positive we can get it, but we may not get it—we might not get it by the 30th; and then the decision is just going to be up to Judge Chandler." (Tr. 90)

(11) Mr. Hayutin replied that he should not be "too hasty" and said: "I think that—I am positive that he is going to come through on this * * * if you will wait one week and if he doesn't have it by Monday the 15th, he said,—I'll go to Oklahoma City with you." (Tr. 92)

(12) Upon advice from his associate, Mr. Berglund, Mr. Barnholt decided to comply with Hayutin's request and wait one week.

(13) Later, about January 11th, Dr. Hammer tried to call Barnholt over the telephone but couldn't reach him, and then got in touch with Mr. Berglund and prevailed upon him to come to Los Angeles and discuss the loan with Dr. Hammer and the bank officials on Monday, January 15th; and the following day the telegram—the one Mr. Barefoot had said would bring the "money"—was dispatched.

These further facts should be borne in mind:

(1) During all of the frustrating experiences Mr. Barnholt and Mr. Berglund were having in Los Angeles, Mr. Barefoot and Mr. Hayutin were repeatedly telling Judge Chandler that the "money" would be there.

(2) Judge Chandler knew nothing of what was going on in Los Angeles; and because, in his words, he had confidence in and a high regard for Mr. Barefoot, the attorney for Occidental and Hayutin, and Western, he accepted his word that the money would be forthcoming.

It is submitted, therefore, that it was the conduct and duplicity of Occidental Petroleum Corporation in making direct promises of the "money" to Judge Chandler, in Oklahoma City, and, at the same time, evading the making of a commitment to officials of Western in Los Angeles, that precipitated the statements made by Judge Chandler, in refusing to consider the financing proposal of Occidental.

The Statements Made by Judge Chandler Do Not Comstitute Personal Bias and Prejudice

In the affidavit for disqualification filed by Occidental, under "Section 144," it is stated (p. 2):

> "The principal statements upon which this affidavit is based took place in the chambers in the United States courthouse, at Oklahoma City, Oklahoma, on the *23rd and 24th days of January, 1962* * * *."

This was six days *after* the Occidental telegram, containing its "financing plan," was brought to Judge Chandler by Occidental attorneys, Barefoot and Fellers.

Also, in the hearing on Occidental's Petition for Disqualification in the Circuit Court of Appeals on March 12, 1962, Mr. Barefoot was asked by the Court as to the petitioner's complaints against Judge Chandler, and Mr. Barefoot replied:

> "We are here complaining of acts which we say commenced on or about the 20th of January, the 18th or 19th, that we say are fundamental, that are unknown in the history of jurisprudence." (Tr. March 12, page 25)

Again, the date fixed is shortly after Judge Chandler received the Occidental proposal and after he had expressed his opinion of it in vigorous terms. But those comments do not constitute "personal bias and prejudice." They constitute judicial opinion based on Occidental's conduct and misrepresentations.

Indeed, in the Reporter's Transcript of January 23 and 24, 1962 the comments of the Judge are based almost entirely

upon the financing proposal of Occidental, and what it reveals as to the conduct and character of its officials.

For example, Judge Chandler refers to the effort of Occidental "to choke this company to death for the benefit of somebody else so they can milk it. * * *". (Tr. 125-26); and that Mr. Hammer "prefers to milk the company and take those nice assets and the drilling equipment and the building" (Tr. 66-67); that it was Hammer's intention to be "in control of this company" (Tr. 61); and that "when you think a man gets out of line, is to stop doing business with him then." (Tr. 99-100)

The foregoing are excerpts only, but it is plain from reading the transcript that the opinions expressed by Judge Chandler were not extra-judicial; they were not prejudices or ill-will that existed independently of this case; they did not constitute "personal bias and prejudice," as that term has been judicially defined; but they arose as a result of the conduct of Occidental in this proceeding.

Therefore, the claim of bias and prejudice does not meet the test required under § 144.

The Holding of the Circuit Court of Appeals As to What Constitutes Bias and Prejudice in a Disqualification Case

In the hearing before the Circuit Court of Appeals on March 13, 1962 (Tr. March 13, page 158) Chief Judge Murrah made the statement that "we have a very narrow

issue, and that is whether or not the Court has conducted this matter in such a way as to disqualify him. And the fact that someone discharged his lawyer on the grounds that he felt there was a conflict of interest, has nothing to do with it."

Following this statement we quote from the Transcript (page 158):

"MR. IRVINE: If the Court please, is not the question even narrower than that? Is it not whether Judge Chandler has personal bias and prejudice against Occidental Petroleum."

"THE COURT (Chief Judge Murrah): *No, I think it is broader than that. No, that is not the issue.*"

"MR. IRVINE: It is the only issue that they have alleged.

"THE COURT (Chief Justice Murrah): That is not the issue that we are trying. Proceed.

"MR. BAREFOOT: I have no further questions.

"THE COURT (Chief Judge Murrah): That is not the sole issue, I should say.

"What else?

"MR. BAREFOOT: Now, Your Honor—

"THE COURT (Chief Judge Murrah): Well, that deserves just a short statement, I think, if my associates will indulge me. We are not just trying an affidavit of prejudice here—if you think that that is the scope of the inquiry, the legal sufficiency of an affidavit of prejudice.

"This Court sits to exercise its supervisory powers, and there are plenty of cases, if you will refer to them in the books, from this Court, to illustrate that very point. We are not just sitting here to decide the legal suf-

ficiency of an affidavit to disqualify a trial judge. We are sitting here in the exercise of our supervisory powers as a court, to determine whether or not in the whole matter of the proceedings here there should be some action on the part of this Court, in the exercise of those powers, which are undisputed. And in doing so, we apprehend that it goes beyond the mere legal sufficiency of an affidavit to disqualify.

"Is that right?

"THE COURT (Judge Pickett): Yes.

"THE COURT (Judge Breitenstein): Surely.

"THE COURT (Chief Judge Murrah): Now, I know that you act like you don't like it, but that's the way it is."

It seems almost unbelievable that, with so much definite authority on the subject, the Court should say that "personal bias and prejudice" is not the issue in a disqualification case. Yet that is exactly what Judge Murrah said. Also, "We apprehend that it goes beyond the mere legal sufficiency of an affidavit to disqualify," said Judge Murrah, as to exercising the Court's "supervisory" powers in a disqualification case. Then he polled his brethren on the bench and Judge Pickett said, "Yes," and Judge Breitenstein said, "Surely." Thus the Court voted to exclude the "personal bias and prejudice" rule in deciding whether or not Judge Chandler should be disqualified.

With all due deference, it is submitted that this holding was erroneous, and that alone should cause the reversal of this case.

Furthermore, in the Per Curiam Opinion of the Court, shown at page 23a, Appendix C, of the Petition for Certiorari filed herein, there is no mention of the "personal bias or prejudice" issue, no finding at all on this question. Although three briefs had been filed by interested parties, with extended discussions and citations of authority on this question, there is no reference to it in the opinion. Instead the "opinion" merely contains the following, and nothing more:

> "3. The Judge has a personal enmity, hostility, bias and prejudice against Occidental and cannot therefore fairly and impartially hear and determine any matter involving Occidental."

In view of the record, it is respectfully submitted that the Court ordered the disqualification of Judge Chandler without deciding whether he was guilty of "personal bias and prejudice."

The Per Curiam Opinion—Other Conclusions

In per curiam opinion, mentioned above, there are two other matters which, the Court says, "we find and conclude." They are:

> "1. The Judge has conducted closed-door hearings, meetings and discussions in chambers at which some but not all of the interested parties were present at the invitation of the Judge and from which the attorneys for some of those present were excluded with the di-

Briefs in opposition to the petition for disqualification were filed by Francis Irvine, Counsel for the Trustee; Herbert F. (Jack) Hewett and Earl A. Brown, attorneys for common stockholders, and J. Kirk Windle, special counsel, and William D. Scheid, attorney for Securities and Exchange Commission.

rection of the Judge that the fact of such proceedings and the matters which transpired therein should not be reported to those attorneys. At these hearings, meetings and discussions matters pertaining to the bankruptcy estate and materially affecting not only those present but those excluded therefrom were considered.

"2. After the filing of the petition in case No. 6972, the Judge tried to prevent a court officer from the performance of his official duties and responsibilities in matters relating to the bankruptcy estate."

First, it is respectfully submitted that neither of these conclusions have any bearing on the issue raised in Occidental's petition for mandamus and or prohibition. No references to them are contained in such petition. Both the petition and the affidavit for disqualification are based on statements made by Judge Chandler, nothing else.

The "Court officer" referred to in Conclusion No. 2 was Russell Ingram, Court Reporter, but he is not seeking any relief. He appeared as Occidental's witness to testify, under Attorney Barefoot's questioning, that Judge Chandler had ordered him not to turn over transcripts of certain conferences to the attorneys for Occidental. Those conferences are the closed-door hearings referred to in Conclusion No. 1.

There is quite a history behind these "in-chambers" conferences. Ironically enough, the first "in-chambers" conference mentioned in this proceeding was held at the instance of Attorney Barefoot himself. That occurred when Mr. Barefoot called Judge Chandler and asked permission to bring Mr. Hayutin to his office for an "off the record" conference on November 2, 1961. Judge Chandler agreed because it was

represented to him that Mr. Hayutin could obtain "financing" for the plan, but the Judge was careful to have present his law clerk and Attorney Barefoot, in whom he had previously expressed his confidence, to hear these conversations. (Tr. of November 2, 1962, p.) It was well that he did so in view of subsequent developments. Also, as shown in Judge ~~Chandler's~~ statement, which has not been contradicted, there were many "in-chambers" conferences between the Judge and Mr. Barefoot between December 15, 1961 and January 17, 1962, relative to Mr. Barefoot's bringing the "money" into court. (Tr., Circuit Court of Appeals, April 10, 1962, p. 15) Again Mr. Barefoot asked that Mr. Hayutin be permitted to talk to the Judge "off the record" on January 23, 1962. (See pages 90 and 91 of the Transcript of that date.)

Certainly there were other "in-chambers" conferences in which Mr. Barefoot did not participate. These are the *only* conferences about which Mr. Barefoot complains. (Transcript, Circuit Court of Appeals, pages 39, 40, March 12-13, 1962)

As a matter of fact, these conferences were not secret at all. The court reporter, Mr. Ingram, who made shorthand records of all the "in-chambers" conferences, was being solicited by Occidental attorneys, Barefoot and Fellers, for transcripts of these "proceedings" as they called them, and had been pressed by these two attorneys for copies of them for two months. (Transcript March 12-13, 1962, Circuit Court of Appeals, p. 48) Judge Chandler had objected to his

furnishing them, (except those of January 23 and 24 when Mr. Barefoot and his two clients were present) because they were not "proceedings" in the case, but merely conferences in which the Judge was seeking information which would benefit the estate, and which would be presented later in an open hearing if it became material. Apparently, the reporter was taking the position that because he was the official court reporter anything he took down was a "court proceeding," notwithstanding the fact that Judge Chandler did not have a secretary at that time. (Transcript, Circuit Court of Appeals, March 12-13, 1962, p. 50)

Regardless of all these things, Judge Chandler, as soon as he heard about the statements of Mr. Barefoot and the Court's inquiries, dispatched a special messenger to Denver with all the transcripts that had been prepared by the reporter and these arrived before the hearing was concluded, and were delivered to the Court. (See Transcript, Circuit Court of Appeals, March 12-13, 1962, pages 55 to 57, inclusive)

It should be called to this Court's attention that often in such proceedings as receiverships, bankruptcy, corporate reorganizations and other such proceedings, matters arise which are administrative in character or collateral to the main issue. Often a court can save time and expense for all parties by preliminary investigations. Such was the case here, where Judge Chandler was seeking to locate financial institutions that might provide the financing of the plan of reorganization.

Every interested party in this case—stockholders, creditors and all others—knew these "in-chambers conferences" were taking place, and that they were merely exploratory. Judge Chandler was seeking to secure the proper financing under a plan of reorganization that had been overwhelmingly adopted by vote of all interested parties, including Occidental. The stockholders, except Occidental and perhaps Hayutin, were appreciative of Judge Chandler's efforts to complete the plan of reorganization as approved by all parties. Many of them lived at great distances from Oklahoma City and these conferences saved them many trips to Oklahoma City which would have been necessary if a formal hearing had been called for every detail. They also then had and now have the fullest confidence in the sincerity, perspicacity and integrity of Judge Chandler, and approved the manner in which he has handled the case. They knew that if and when it became necessary to change or finalize the plan, there would be a full and open hearing on the matter. No objection had ever been raised to these exploratory conferences until Occidental instituted this proceeding.

Yet, the Circuit Court of Appeals appeared to be more concerned about these conferences than it was with the real issue,—the personal bias or prejudice of Judge Chandler toward Occidental. It should be *emphasized here that nothing irregular was revealed in any of these transcripts.* The order of the Circuit Court of Appeals was not directed at anything

that occurred in these conferences; it simply held that all such matters should be conducted in open hearings.

During the hearing on April 10, 1962, while Mr. Windle, Counsel for Securities and Exchange Commission, was addressing the Court, he was interrogated by members of the Court about these hearings. Quoting from the record (Transcript, Circuit Court of Appeals, April 10, 1962, pages 78 to 80):

"MR. WINDLE: Now, in this interim between December 15th and January 30th, I think the Court was carrying out his duty to try to see that the financing was forthcoming and that the plan could be consummated.

"Now I will say this: that some Judges will involve themselves more into a case than others. Some Judges would have left it entirely to the Trustee. It is a question of balance, as to what the Judge conceives his functions to be. As has been pointed out—

"THE COURT (Chief Judge Murrah): Do you favor a Judge being both investigator and a Judge?

"MR. WINDLE: I would say this, that a Judge is charged by statute with the duty to administer the estate, and the responsibility to do so. He normally acts through his Trustee. Judge Chandler, in this instance, took it upon himself to negotiate and try to bring this financing into line.

"THE COURT (Chief Judge Murrah): And the Securities and Exchange Commission approves that conduct?

"MR. WINDLE: I would say this, that to some extent it is inevitable in a Chapter 10 case. I think that some

Judges can overdo it, as far as injecting themselves into the administration of the estate. However, I think, on the other extreme, a Judge who does not acquaint himself with the problems of administration can do as much harm in a Chapter 10 case as one who goes to the other extreme and undertakes to perform the duties of a Trustee himself. And frankly, we would prefer to have a Judge who was in the middle, or who kept himself informed but left most of the details to the Trustee; and, in that respect, I would say that Judge Chandler probably goes to the one extreme more than we would like to see in Chapter 10 cases. However, I don't think that that is a basis for disqualification of the Judge."

The record will disclose that all the attorneys and interested parties who participated in the proceeding before the Circuit Court of Appeals, other than Occidental Petroleum Corporation, Hammer and Hayutin, endorse and share the views expressed by Mr. Windle.[4]

CONCLUSION

Adverting to the only issue raised in this case,—the disqualification of Judge Chandler for alleged bias and prejudice

[4]Section 11a, Title 11, United States Code, provides that courts of bankruptcy are invested "with such jurisdiction at law and in equity as will enable them to exercise original jurisdiction in proceedings under this title, in vacation, *in chambers* and during their respective terms as they are now or may hereafter be held * * *."

Also, Section 77B, Federal Rules of Civil Procedure provides: "All trials upon the merits shall be conducted in open court and so far as convenient in a regular court room. All *other* acts or proceedings may be done or conducted by a judge *in chambers*, without the attendance of the clerk or other court officials and at any place, either within or without the district."

toward Occidental Petroleum Corporation—it is respectfully submitted that, for the reasons:

(1) The remedy of Occidental, if any, is by appeal from the final judgment and not under the All Writs Act;

(2) The Amended Petition for Mandamus and or Prohibition conferred no jurisdiction upon the Court because it is not supported by an affidavit under § 144, Title 28, United States Code;

(3) The "Judicial Council" of a Circuit is not empowered, under § 332 of Title 28, United States Code, to disqualify a District Judge from hearing a case pending before him; and

(4) The facts and statements attributed to Judge Chandler do not constitute "personal bias and prejudice" as those words are used in said § 144;

and for the further reasons that:

(1) that the decision of the Circuit Court of Appeals is in conflict with decisions of other Circuit Courts of Appeals as to the "personal bias or prejudice" issue (cited under 4 hereinabove), and

(2) that strict compliance with the provisions of § 144, Title 28, United States Code, as the exclusive remedy of disqualifying a District Judge, is of the utmost importance in preventing abuses of the privileges it affords, and in safeguarding the Judiciary, generally, from unwarranted attacks upon its dignity, its integrity, and its independence;

the judgment of disqualification, entered by the Circuit Court of Appeals for the Tenth Circuit on the 20th day of

April, 1962, should be reversed and expunged from the record.

Respectfully submitted,

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Dallas 1, Texas,
Amicus Curiae.

Of Counsel:
HERBERT F. HEWETT,
Oklahoma City, Oklahoma.

DELMER L. STAGNER,
Oklahoma City, Oklahoma.

GENE M. GARDNER,
Duncan, Oklahoma.

JOHN S. BOTTOMLY,
Boston, Massachusetts.

EXHIBIT 1

The Telegram

Mr. Bert Barefoot, Esq.
Liberty Bank Bldg., Oklahoma City, Okla.

Mr. R. W. Barnholt, Jr.
President, Western Oil Fields, Inc.
1827 Grant, Denver

Dear Mr. Barnholt:

Our bank has approved, subject to the conditions herein contained, your application for a $2,000,000.00 loan to be secured by all of the oil and gas properties and drilling equipment of Western Oil Fields, Inc., and Donnell Drilling Company, Western's wholly owned subsidiary, including but nowise limited to those properties which are currently being purchased by Western from Parker Petroleum Co., Inc., which properties will be described in a mortgage and mortgage of chattels securing said loan. Said loan shall be further secured by a mortgage and covering that certain real property in Odessa, Texas, where the major portion of said drilling equipment is presently tored.

Said loan is to be secured also by an assignment covering the proceeds of all of the oil, gas and hydrocarbons produced, saved and sold from said oil and gas properties. Seventy percent of said proceeds, or $36,000 plus interest per month, whichever is higher, shall be applied to the reduction of principal and interest on said loan starting January 15, 1962, with the first payment due no later than

March 27, 1962, and with subsequent payments due on the 27th day of each succeeding month thereafter until the loan is fully paid. The loan will bear interest at the rate of 6½ per cent per annum on outstanding balances of principal and will be payable in accordance with the following payment schedule: Each of the foregoing monthly installments shall be applied first to the payment of interest then owing and the balance of such payment shall be applied to principal.

The above loan shall be subject to strict compliance with the following conditions:

1. A loan agreement executed by Western in the Bank's usual form and satisfactory to the bank.

2. Legal fees and expenses attributable to the reorganization of Parker payable by Western shall be limited to an amount not exceeding $250,000.00.

3. Indebtedness of Parker to its creditors, secured and unsecured, shall be less than $2,000,000.00, including interest if any.

4. Western shall have raised $500,000.00 or more from the sale of common stock and or convertible notes for cash to Western.

5. A guarantee by Occidental Petroleum Corporation of a note for $300,000.00 of said loan, it being understood that said note will be paid from the proceeds of sale of the assets of Donnell including the drilling rigs, other equipment and real properties located in Odessa, Texas.

6. Receipt by the bank of a commitment from Continental Illinois National Bank and Trust Company of Chicago and First National Bank of Denver to participate with the bank in the amount of $500,000.00 each.

7. The formation of an executive committee consisting of five men, all of whom are satisfactory to the Bank and which committee must have approval of at least four members for all major expenditures and material changes in operations; and that the Board of Directors of Western will be increased from seven to nine and the two new members will be satisfactory to the bank. The two new members will be members of the new executive committee.

8. Receipt by the bank of an opinion by outside counsel acceptable to the bank showing good title to properties securing said loan standing in Western.

9. Approval by the bank of the condition of title to all properties securing said loan.

10. Opinion of counsel acceptable to the bank to the effect that stockholders's suits and other claims against Western do not represent a material liability.

11. All matters and documents relating to the loan are to be in such form and content as are acceptable to our counsel.

12. There will be no commitment fee due the bank for making this loan.

13. There will be no prepayment penalty unless from other bank borrowings and then said penalty at the rate of ½ of 1 percent per annum on the unpaid balance.

14. All expenses in connection with the loan including attorney fees abstract of title, recording fees, etc. are to be borne by Western.

If the foregoing terms are acceptable to you will you please evidence your approval thereof by signing and returning the accompanying copy of this letter. This commitment will expire by limitation within 10 days from date hereof unless we are in receipt of an acceptance before such date.

Very truly yours,

C. R. Dodson, Vice President.